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IN THE

UNITED STATES SUPREME COURT

October Term, 1925 No. 181

FRANK A. HARRIGAN, Trustee of the bankrupt estate of The Louis J. Bergdoll Motor Company, a corporation organized under the laws of the State of Pennsylvania,

Petitioner,

v.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

JOSEPH W. CATHARINE,
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1924. No. .

FRANK A. HARRIGAN, Trustee of the bankrupt estate of The Louis J. Bergdoll Motor Company, a corporation organized under the laws of the State of Pennsylvania,

Petitioner,

v.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Frank A. Harrigan, Trustee in Bankruptcy of The Louis J. Bergdoll Motor Company, respectfully represents:

That this petition is filed to obtain a review and determination by this Court of the final judgment

and decree of the Supreme Court of the Commonwealth of Pennsylvania, the court of last resort, entered on the 8th day of July, A. D. 1924, affirming the judgment of the Court of Common Pleas No. 4 of Philadelphia County, in the case of Frank A. Harrigan, Trustee in Bankruptcy of The Louis J. Bergdoll Motor Company, against Louis J. Bergdoll, now known as Louis J. Bergson, which judgment was entered against the plaintiff-petitioner and in favor of the defendant-respondent *non obstante veredicto*. On February 15, 1923, the verdict was rendered for the plaintiff-petitioner, by direction of the Court, for the sum of $192,909.24.

A duly certified copy of the transcript of the entire record in this case is herewith filed as an Exhibit to this petition.

The questions involved in the cause are as follows:

(1) Where a Trustee in Bankruptcy, proceeding in conformance with the Federal Bankruptcy Act and the practice thereunder, to collect an asset of a bankrupt estate, obtains an order from a Referee in Bankruptcy within six years from the date of bankruptcy, assessing a person upon a stock liability, and the person so assessed filed a petition for review to the District Court of the United States, which Court confirmed said order of assessment, and he then appealed from said confirmance of said order of assessment to the United States Circuit Court of Appeals which affirmed the order of the District Court, can a State court apply against the Trustee in Bankruptcy a state statute of limitations of six years where the running of the statute of limitations was made possible by the action of the defendant in appealing from said orders?

(2) Where a suit is brought by a Trustee in Bankruptcy in a State court upon a decree of a United States court, ordering an assessment upon a stock liability against a defendant, does the statute of limitations run against the trustee, as found by the State court, from the date of insolvency of the corporation, or does it run from the date of the decree of the United States court finally ordering the assessment?

(3) Where there is a conflict of decisions in the highest court of a State, upon the subject of the application of the statute of limitations, applied to the liability of stockholders of corporations, will the Supreme Court of the United States be bound by the decision of the Court in this case, or apply the rule as laid down by it in like cases?

(4) Where a trustee, appointed under the Bankruptcy Act of the United States, sought to recover an asset of the bankrupt estate under that Act, and a State court applied a State statute of limitations against his right of action which accrued by reason of his authority under the Federal Bankrupt laws, was he not denied a right or title specially claimed under a law of the United States which entitles him to a review by this Court?

The following are the facts in this case:

On April 13, 1913, The Louis J. Bergdoll Motor Company was adjudicated a bankrupt in the United States District Court for the Eastern District of Pennsylvania, and thereafter Frank A. Harrigan was duly elected and appointed trustee. The said bankrupt company was a Pennsylvania corporation, incorporated March 18, 1912, with an authorized

capital stock of $500,000.00. 3,000 shares of the par value of $100.00 each were issued as follows:

Louis J. Bergdoll, now Bergson,	2998 shares
E. L. Webster	1 share
Frank J. Fanning	1 share.

1. Thereafter the trustee proceeded to administer the bankrupt estate, collect the assets, and reduce the claims. A comprehensive view of this work will be found by reference to the docket entries in the case in the District Court of the United States for the Eastern District of Pennsylvania (Record, pp. 113a to 121a, inclusive), and by reference to the docket entries of proceedings before the Referee in Bankruptcy in the same case (Record, pp. 125a to 138a, inclusive).

2. The matters involved large sums and were important. Among them was a claim for $310,000.00 filed by the defendant-respondent, and after opposition by the Trustee in Bankruptcy it was reduced to $10,000.00. A suit was brought by the Trustee in Bankruptcy against Erwin R. Bergdoll, a brother of the defendant-respondent, claiming $31,270.00 paid him as a preference by the bankrupt, which suit was tried in the District Court of the United States for the Eastern District of Pennsylvania, resulting in a verdict for the trustee in the sum of $33,370.35. An appeal was taken by that defendant to the Court of Appeals, which affirmed the judgment, and he then sued out a writ of error to the Supreme Court of the United States, which writ of error was dismissed by that court upon motion of the Trustee in Bankruptcy (see docket entries, Record, pp. 123a and 124a).

3. In the course of proceedings in bankruptcy it appeared that the 3,000 shares of the capital stock of the bankrupt company of the par value of

$300,000.00 were issued to Bergdoll, Webster and Fanning, by the bankrupt, for assets of the value of approximately $145,000.00.

4. After all other matters in the bankruptcy proceeding had been closed, and in conformance with the Federal bankrupt laws and procedure thereunder, on October 22nd, 1917, the trustee filed a petition for an assessment upon the capital stock of the bankrupt and for leave to institute proceedings to recover unpaid subscriptions (Record, p. 139a).

5. On November 15, 1917, the defendant-respondent filed an answer to said petition (Record, p. 144a), wherein he denied the right of the trustee to an assessment on the stock of the bankrupt company.

6. On May 9, 1918, the Referee filed an opinion, making an order of asessment, and on May 18, 1918, on the petition of the defendant-respondent, extended the time for filing a petition for review to May 22, 1918. On May 29, 1918, the defendant-respondent filed a petition for the review of the Referee's order which was entered May 20, 1918, and a certificate for review was duly filed on June 26, 1918, in the United States District Court for the Eastern District of Pennsylvania. On November 13, 1918, the United States District Court referred the matter back to the Referee for further proceedings (Record, pp. 137a and 138a).

7. Hearings and arguments were had before the Referee on the questions involved, and on February 14, 1919 (Record, pp. 137a and 138a), the Referee entered his final order, making an assessment of 51.85% of the par value of the said 3,000 shares of capital stock of said bankrupt company, to wit: the sum of $155,571.97, with interest thereon from April 1, 1912, and ordering the defendant-respondent to

pay to the trustee the amount thereof, to wit: the sum of $219,771.34.

8. On February 24, 1919 (Record, p. 120a), the defendant-respondent presented and filed and was granted an order extending the time within which he might file his petition for review of the Referee's order until March 6, 1919, and on March 15, 1919, the proceedings before the Referee, assessing the stock, were filed in the United States District Court for the Eastern District of Pennsylvania and on July 1, 1919, the United States District Court by Judge Dickinson (Record, p. 121a), filed an opinion denying the defendant-respondent's petition for review, approving the findings of the Referee, and affirming and confirming the order made.

9. On July 10, 1919 (Record, p. 121a), the defendant-respondent presented a petition for the allowance of an appeal to the Circuit Court of Appeals for the Third Circuit, appealing from the order of the United States District Court affirming and confirming the order of the Referee making the assessment and directing the defendant-respondent to pay $219,771.34 to the trustee. On March 29, 1920, the mandate of the United States Circuit Court of Appeals was filed in the United States District Court, reversing the decree of the District Court insofar as it fixed personal liability on the defendant-respondent and the amount thereof, but insofar as it adjudicated the necessity for an assessment on the stock of the bankrupt, the right thereto, and those who appeared *prima facie* subject to the assessment, it was affirmed. (See *Bergdoll v. Harrigan*, 263 Fed. p. 283.)

10. Thereafter on July 13, 1921, the Trustee in Bankruptcy brought a suit in the Court of Common Pleas No. 4 of Philadelphia County against the defen-

dant-respondent *upon the original order and decree for assessment on the bankrupt's stock*, made by the Referee in Bankruptcy and as finally affirmed by the United States Circuit Court of Appeals for the Third Circuit (see Statement of Plaintiff's Claim in that suit, Record, pp. 7a and 8a), and to this suit the defendant-respondent filed an affidavit of defense (Record, pp. 14a, *et seq.*), wherein he set up the following defenses:

> "1st. That his subscription to stock in The Louis J. Bergdoll Motor Company was paid in full by the transfer to it of tangible assets worth, at least, $144,428.03 and the cancellation of a claim for $300,000, the payment of which that corporation had assumed.
>
> 2nd. That none of the creditors of the bankrupt corporation gave it credit upon the faith of the statement that its stock was fully paid.
>
> 3rd. That the stock originally issued to or for him was transferred to others while the corporation was still solvent.
>
> 4th. That the claim is barred by the statute of limitations."

11. Upon these issues, as framed, the cause proceeded to trial before the Honorable Charles Y. Audenried, President Judge of Court of Common Pleas No. 4 of Philadelphia County and a jury, on the 14th day of February, 1923, and on the 15th day of February, 1923, the Court directed the jury to find a verdict for the plaintiff-petitioner in the sum of $192,909.24, whereupon the jury rendered a verdict for the trustee in that amount (see Charge of Court, Record, pp. 93a, *et seq.*).

12. On February 19, 1923, the defendant-respon-

dent filed a motion for a new trial and for judgment *non obstante veredicto*, which motions were duly argued before the Court of Common Pleas No. 4 *en banc*, and on February 13, 1924, in an opinion by Audenried, J., the Court granted defendant-respondent's motion for judgment *non obstante veredicto* and entered judgment in favor of the defendant-respondent and against the plaintiff-petitioner, the Court saying in its opinion (Record, p. 229a):

> "*It thus appears that, apart from the question of the effect of the statute of limitations, the plaintiff's claim was established.* • • • We must hold that • • • the statute of limitations had already run in favor of the defendant, and that the plaintiff's claim is barred."

13. From this judgment the Trustee in Bankruptcy prosecuted his appeal to the Supreme Court of the Commonwealth of Pennsylvania, and on July 8, 1924, that Court, in an opinion by Frazer, J., affirmed the judgment of the Court of Common Pleas No. 4. The opinion of that Court is attached to and made part of the record filed herewith.

REASONS FOR THE ALLOWANCE OF WRIT OF CERTIORARI.

I.

Your petitioner shows to your Honorable Court that he proceeded in the bankruptcy court with as much diligence as the nature of the case permitted, and that, except for the appeals against the order of assessment by the defendant-respondent, he

would have been able to bring action within six years from the date of the insolvency of the corporation, even should the Supreme Court of Pennsylvania be correct in holding that the statute ran from the date of insolvency and not from the date of the assessment and order in bankruptcy, as has been repeatedly held by your Honorable Court and courts in other jurisdictions.

II.

While the appeals of the defendant-respondent were pending against the order of assessment, no other action could have been brought by the trustee because the District Court of the United States had jurisdiction of all the parties and the subject matter, and had the order been finally affirmed or reversed in its entirety by the Court of Appeals, it would have finally ended the litigation. Consequently, no suit could have been properly brought by the trustee until the defendant-respondent's appeals had been passed upon by the United States Courts of bankruptcy, and in the application of the statute of limitations the State courts gave no consideration to these proceedings, which were had between the same parties and upon the same subject matter.

III.

To permit this judgment to stand will cause a conflict of decisions in the proper administration of bankruptcy, and the creditors of this bankrupt es-

tate will be penalized because the trustee followed strictly the procedure as laid down by your Honorable Court in bankruptcy matters affecting causes of this character, while the defendant, who delayed the matter by his appeals until such time as the statute ran, as found by the Supreme Court of Pennsylvania, will profit thereby: *Scoville v. Thayer*, 105 U. S. 143.

IV.

Your petitioner insists to your Honorable Court that in a bankruptcy proceeding the statute should run necessarily from the date of the order of assessment and not from the date of the insolvency, because of the great length of time necessary to properly administer an involved estate, as this was, and particularly in this case where the defendant, who invokes the bar of the statute of limitations, was an active and the sole party in interest to all the proceedings had to fix his liability in the United States courts. This was no assertion of a stale claim against him.

V.

The guide for the trustee in this proceeding was the opinion of your Honorable Court in *Scoville v. Thayer*, 105 U. S. pp. 155, 156, 157 and 158, where the liability of the defendant, Thayer, was a secondary liability, as in the instant case.

VI.

Your petitioner shows to your Honorable Court that the cause of action upon which this suit was brought was not the original contract or obligation of the defendant-respondent to pay, but *was the decree of the United States District Court for the Eastern District of Pennsylvania in Bankruptcy* (opinion of trial Judge, Record, p. 224a), and that the petition for that order was filed on October 22, 1917, less than six years after the date of bankruptcy; and if a State statute of limitations would run against a decree of a court in such a case, it would only be from the time the said order became final.

VII.

Under paragraph 237 of the Judicial Code your Honorable Court has jurisdiction to review the final judgment of the Supreme Court of the Commonwealth of Pennsylvania, because the suit was brought by a trustee in bankruptcy, in virtue of the power and authority conferred upon him by a law of the United States, seeking to recover what was asserted to be an asset of the bankrupt estate under that law. Therefore, a Federal question is presented in this case, and the denial of the asserted right was a denial of a right or title specially claimed under a law of the United States: *Rector, Trustee v. City Deposit Bank Co.*, 200 U. S. p. 411; *Rector, Trustee v. Commercial National Bank*, 200 U. S. p. 423. Both of these opinions were by the late Chief Justice, Honorable Edward D. White.

For the above reasons your petitioner respectfully prays that this Honorable Court issue a writ of certiorari under its seal, directed to the said Supreme Court of the Commonwealth of Pennsylvania, commanding the said court to certify and send to it, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the Supreme Court of the Commonwealth of Pennsylvania in said cause therein, entitled:

"January Term, 1925. No. 18.

FRANK A. HARRIGAN, Trustee of the Bankrupt Estate of The Louis J. Bergdoll Motor Company, a corporation organized under the laws of the State of Pennsylvania,

Appellant,

v.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGSON,"

to the end that the said cause and proceedings may be reviewed and determined by this Honorable Court; that the errors which have occurred therein may be corrected, and that said judgment of the said Supreme Court of the Commonwealth of Pennsylvania be reversed, and that petitioner may have such other and further relief as may be appropriate.

Respectfully submitted,

JOSEPH W. CATHARINE,

Attorney for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1925. No. 181.

FRANK A. HARRIGAN, Trustee of the Bankrupt Estate of the LOUIS J. BERGDOLL MOTOR COMPANY,
Petitioner,

v.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGSON.

PETITIONER'S BRIEF ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

Petition for Certiorari filed September 27, 1924.
Certiorari granted November 17, 1924.
(30,633)

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IN THE

Supreme Court of the United States

October Term, 1925. No. 181.

FRANK A. HARRIGAN, Trustee of the Bankrupt Estate of the LOUIS J. BERGDOLL MOTOR COMPANY,
Petitioner,

v.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGSON.

PETITIONER'S BRIEF ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

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IN THE

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October Term, 1925. No. 181.

FRANK A. HARRIGAN, Trustee of the Bankrupt Estate of the LOUIS J. BERGDOLL MOTOR COMPANY,
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v.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGSON.

PETITIONER'S BRIEF ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

This case was decided in the Supreme Court of Pennsylvania and is reported as HARRIGAN, TRUSTEE, APPELLANT v. BERGDOLL, 281 Pa. 186.

The opinion of the Supreme Court of the Commonwealth of Pennsylvania is printed in full (R. 128, 129, 130).

The final judgment was rendered by the Supreme Court of the Commonwealth of Pennsylvania in an opinion filed July 8, 1924 (R. 128).

The petitioner's specific claim is that the state courts of Pennsylvania were without power to apply a state stat-

ute of limitations against a suit brought upon a decree of the United States Court until six years after the entry of such decree, and that the entry of such decree in the United States District Court in Bankruptcy fixed the beginning of the cause of action against Bergdoll, before which time the trustee had no cause of action. This contention was decided adversely to the petitioner by the Court of Common Pleas No. 4 of Philadelphia County, Pennsylvania, in an opinion filed (R. 121, 122, 123, 124, 125), and it was subsequently affirmed by the Supreme Court of Pennsylvania in the opinion above referred to (R. 128).

This suit having been brought by a Trustee in Bankruptcy under and by virtue of his appointment under the Federal Bankruptcy law, in an endeavor to collect an asset for the creditors of a bankrupt estate, which right was denied him, under paragraph 237 of the Judicial Code this Court has jurisdiction to review the final judgment of the Supreme Court of Pennsylvania because such denial was a denial of a right or title specially claimed under a law of the United States. That the foregoing view is correct is borne out by the decisions of your Honorable Court in Rector, Trustee v. City Deposit Bank Co., 200 U. S. 411, and Rector, Trustee v. Commercial National Bank, 200 U. S. 423, in which cases the opinions were written by the late Chief Justice Honorable Edward D. White.

The following is a concise statement of the facts necessary to a consideration of the questions involved:

1. On April 13, 1913, The Louis J. Bergdoll Motor Company was adjudicated a bankrupt in the United States District Court for the Eastern District of Pennsylvania, and thereafter Frank A. Harrigan was duly elected and appointed trustee. The said bankrupt company was a Pennsylvania corporation, incorporated March 18, 1912, with an authorized capital stock of $500,000.00. 3,000 shares of the par value of $100.00 each were issued as follows:

Louis J. Bergdoll, now Bergson,	2998 shares
E. L. Webster	1 share
Frank J. Fanning	1 share.

2. Thereafter the trustee proceeded to administer the bankrupt estate, collect the assets, and reduce the claims. A comprehensive view of this work will be found by reference to the docket entries in the case in the District Court of the United States for the Eastern District of Pennsylvania (R. 61-66), and by reference to the docket entries of proceedings before the Referee in Bankruptcy in the same case (R. 66-75).

3. The matters involved large sums and were important. Among them was a claim for $310,000.00 filed by the respondent, and after opposition by the Trustee in Bankruptcy it was reduced to $10,000.00. A suit was brought by the Trustee in Bankruptcy against Erwin R. Bergdoll, a brother of the respondent, claiming $31,270.00 paid him as a preference by the bankrupt, which suit was tried in the District Court of the United States for the Eastern District of Pennsylvania, resulting in a verdict for the trustee in the sum of $33,370.35. An appeal was taken by that defendant to the Court of Appeals, which affirmed the judgment, and he then sued out a writ of error to the Supreme Court of the United States, which writ of error was dismissed by that court upon motion of the Trustee in Bankruptcy (R. 66, 67).

4. In the course of proceedings in bankruptcy it appeared that the 3,000 shares of the capital stock of the bankrupt company of the par value of $300,000.00 were issued to Bergdoll, Webster and Fanning, by the bankrupt, for assets of the value of approximately $145,000.00.

5. After all other matters in the bankruptcy proceeding had been closed, and in conformance with the Federal bankrupt laws and procedure thereunder, on October 22nd, 1917, the trustee filed a petition for an assessment upon the capital stock of the bankrupt and for leave to institute proceedings to recover unpaid subscriptions (R. 75).

6. On November 15, 1917, the respondent filed an answer to said petition (R. 78), wherein he denied the right of the trustee to an assessment on the stock of the bankrupt company.

7. On May 9, 1918, the Referee filed an opinion, making an order of assessment, and on May 18, 1918, on the petition of the respondent, extended the time for filing a petition for review to May 22, 1918. On May 29, 1918, the respondent filed a petition for the review of the Referee's order which was entered May 20, 1918, and a certificate for review was duly filed on June 26, 1918, in the United States District Court for the Eastern District of Pennsylvania. On November 13, 1918, the United States District Court referred the matter back to the Referee for further proceedings (R. 65).

8. Hearings and arguments were had before the Referee on the questions involved, and on February 14, 1919 (R. 52, 53, 54), the Referee entered his final order, making an assessment of 51.85% of the par value of the said 3,000 shares of capital stock of said bankrupt company, to wit: the sum of $155,571.97, with interest thereon from April 1, 1912, and ordering the defendant-respondent to pay to the trustee the amount thereof, to wit: the sum of $219.771.34.

9. On February 24, 1919 (R. 65), the respondent presented and filed and was granted an order extending the time within which he might file his petition for review of the Referee's order until March 6, 1919, and on March 15, 1919, the proceedings before the Referee, assessing the stock, were filed in the United States District Court for the Eastern District of Pennsylvania and on July 1, 1919, the United States District Court by Judge Dickinson (R. 65), filed an opinion denying the respondent's petition for review, approving the findings of the Referee, and affirming and confirming the order made.

10. On July 10, 1919 (R. 65), the respondent presented a petition for the allowance of an appeal to the Circuit Court of Appeals for the Third Circuit, appealing from the order of the United States District Court affirming and confirming the order of the Referee making the assessment and directing the respondent to pay $219,771.34 to

the trustee. On March 29, 1920, the mandate of the United States Circuit Court of Appeals was filed in the United States District Court, reversing the decree of the District Court in so far as it fixed personal liability on the respondent and the amount thereof, but in so far as it adjudicated the necessity for an assessment on the stock of the bankrupt, the right thereto, and those who appeared *prima facie* subject to the assessment, it was affirmed (see BERGDOLL v. HARRIGAN, 263 Fed. 279).

11. Thereafter on July 13, 1921, the Trustee in Bankruptcy brought a suit in the Court of Common Pleas No. 4 of Philadelphia County against the respondent *upon the original order and decree for assessment on the bankrupt's stock*, made by the Referee in Bankruptcy and as finally affirmed by the United States Circuit Court of Appeals for the Third Circuit (see Statement of Plaintiff's Claim in that suit, R. 2, 3, 4, 5, 6, 7), and to this suit the respondent filed an affidavit of defense (R. 7, *et seq.*), wherein he set up the following defenses:

"1st. That his subscription to stock in The Louis J. Bergdoll Motor Company was paid in full by the transfer to it of tangible assets worth, at least, $144,428.03 and the cancellation of a claim for $300,000, the payment of which that corporation had assumed.

2nd. That none of the creditors of the bankrupt corporation gave it credit upon the faith of the statement that its stock was fully paid.

3rd. That the stock originally issued to or for him was transferred to others while the corporation was still solvent.

4th. That the claim is barred by the statute of limitations."

12. Upon these issues, as framed, the cause proceeded to trial before the Honorable Charles Y. Audenried, President Judge of Court of Common Pleas No. 4 of Philadelphia County, and a jury, on the 14th day of February, 1923, and on the 15th day of February, 1923, the Court directed the jury to find a verdict for the petitioner in the sum of $192,909.24, whereupon the jury rendered a verdict for the trustee in that amount (see Charge of Court, R. 50, *et seq.*).

13. On February 19, 1923, the respondent filed a motion for a new trial and for judgment *non obstante veredicto*, which motions were duly argued before the Court of Common Pleas No. 4 *en banc*, and on February 13, 1924, in an opinion by Audenried, J., the Court granted respondent's motion for judgment *non obstante veredicto* and entered judgment in favor of the respondent and against the petitioner, the Court saying in its opinion (R. 121):

> "*It thus appears that, apart from the question of the effect of the statute of limitations, the plaintiff's claim was established.* • • • We must hold that • • • the statute of limitations had already run in favor of the defendant, and that the plaintiff's claim is barred."

14. From this judgment the Trustee in Bankruptcy prosecuted his appeal to the Supreme Court of the Commonwealth of Pennsylvania, and on July 8, 1924, that Court, in an opinion by Frazer, J., affirmed the judgment of the Court of Common Pleas No. 4. The opinion of that Court is attached to and made part of the record filed herewith (R. 128).

ARGUMENT.

The trustee-petitioner proceeded against the respondent, upon a decree of the United States District Court in Bankruptcy, to collect the difference in value between assets which the respondent actually turned over to the Bergdoll Motor Car Company and $300,000 worth of stock which was issued to him therefor. The date of the bankruptcy was April 11, 1913 (R. 62), and the trustee-petitioner filed his petition for the assessment against the respondent on October 22, 1917 (R. 75). The respondent filed an answer to the trustee's petition on November 15, 1917 (R. 78), wherein he contested the right of the trustee to an assessment on the following grounds: (1) That said stock was issued full paid and non-assessable for the assets of the New Jersey corporation; (2) that no stock was subscribed for by anyone in the Pennsylvania corporation; (3) that his liability was *res adjudicata;* (4) that he was not a stockholder of either corporation when the Pennsylvania company was adjudicated bankrupt, or when the petition was filed; (5) that the company was solvent when he assigned his stock.

Hearings were had and the respondent bitterly contested the right of the trustee-petitioner to an assessment, and finally, on February 14, 1919, the Referee entered an order making an assessment against him of .5185% of the par value of 3,000 shares of stock and interest (R. 5, 54). Thereupon the respondent filed a petition to the United States District Court to revise, which Court affirmed and confirmed the order of the Referee (R. 74), whereupon he appealed to the United States Circuit Court of Appeals of the Third Circuit, which tribunal reversed the order in so far as it fixed respondent's personal liability, but in so far as said decree adjudicated the necessity for an assessment of the stock of the bankrupt and the rate thereof, and to those *prima facie* subject to the assessment, the decree was affirmed (R. 16) (see HARRIGAN v. BERGDOLL, 263 Fed. 279).

The final order by the Circuit Court of Appeals in the matter was March 27, 1920 (R. 55). The petition for the assessment was filed by the trustee-petitioner on October 22, 1917, and, due to the contest of the respondent and his appeals from said orders, there was a delay of two years and five months.

When the decree became final the trustee-petitioner went into the Court of Common Pleas No. 4 Philadelphia County and brought suit July 13, 1921, upon the decree as his cause of action (R. 2), and the respondent set up as defenses the same reasons advanced in the bankruptcy proceedings, with the additional one of the plea of the bar of the statute of limitations. The Court directed judgment in favor of the trustee-petitioner on the 15th day of February, 1923, for $192,909.24, and upon the respondent's motion for a new trial and judgment *non obstante veredicto*, the Court of Common Pleas overruled the motion for new trial but granted judgment *non obstante veredicto* and entered judgment against the trustee-petitioner, the Court saying in its opinion (R. 121): "It thus appears that, apart from the question of the effect of the statute of limitations, the plaintiff's claim is established. We must hold that the statute of limitations had already run in favor of the defendant."

An appeal was taken by the trustee-petitioner to the Supreme Court of the Commonwealth of Pennsylvania, which, in an opinion (HARRIGAN v. BERGDOLL, 281 Pa. 186), affirmed the judgment of the court below upon the authority of SWEARINGEN v. DAIRY CO., 198 Pa. 68.

The proposition advanced by the trustee-petitioner is as follows: That when the decree of the United States District Court became final, then and then only was his cause of action established; and that his cause of action dated from that time. Consequently, the State Court was without power, where the suit had been brought upon the decree of the United States Court, to go behind that decree and say that the cause of action antedated the date of the decree sued upon and that therefore the statute of limitations was applicable from the earlier date. The facts in SWEARINGEN v. DAIRY CO., 198 Pa. 68, were quite

different from those in the case at bar, and were as follows: The directors authorized an assessment in 1889 for 25% of the stock subscription, but the call was not actually made. In that case a *definite sum* was due and unpaid. In 1891, the company made an assignment for the benefit of creditors. The assignee made no effort to collect the delinquent subscriptions; or to have any call or assessment made therefor. In 1899, or about eight years after the assignment, and ten years after the call was authorized, a creditor's bill was filed to collect the balance due on the subscription. Defendant pleaded laches and bar of statute. The plaintiffs contended that, as no call had been made by the corporation for the balance due on the subscription, the statute of limitations did not begin to run and the plaintiffs could, therefore, maintain the bill. Held, that the right of action accrued upon the insolvency of the company, shown by the assignment for the benefit of creditors, and that the statute of limitations began to run from that date. In that case, the exact sum due by the stockholder was known and the creditors, upon his refusal to act, had the undoubted right to institute proceedings against the delinquent stockholders.

Whereas, in the instant case, at the time of the bankruptcy, there was nothing due from the respondent to the corporation as, between him and it, everything had been paid. There was, however, a contingent liability on his part to pay for his stock the difference between its real value and what he actually paid in assets, provided there was a deficiency in the assets to pay creditors. The proceedings in bankruptcy were had to that end, and the last thing done by the trustee after all claims were reduced and all assets collected, was to file a petition to compel the respondent to pay, and this was within six years from the date of bankruptcy. It must be taken into consideration that, in an involved bankruptcy case, the liability of individuals is not always apparent immediately at the time of the inception of proceedings, but usually develops after close examination of the bankrupt's affairs. Just when this occurred in the present proceedings does not appear.

The facts in this case are controlled by the opinion of this Court in SCOVILL v. THAYER, 105 U. S. 153, 154, 155, 156, 157, 158, opinion by Mr. Justice Woods:

> "We are next to consider whether, upon the facts as disclosed by the record, the defense of the Statute of Limitations should have been sustained. The precise question with which we have to deal is, when would this action at law, brought by the assignees of the bankrupt Company against a stockholder to recover a part of the balance due on his stock, be barred by the statute?
>
> "This will depend on the answer to the question, when did the cause of action accrue to the assignees? In other words, when could they have commenced this action against this defendant to recover the amount due on his stock? Wilcox v. Plummer, 4 Pet. 172; Amy v. Dubuque, 98 U. S. 470 (XXV., 228).
>
> "The stock held by the defendant in error was evidenced by certificates of full paid shares. It is conceded to have been the contract between him and the Company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the Company this was a perfectly valid agreement. It was not forbidden by the charter of the Company or by any law or public policy, and as between the Company and its stockholders was just as binding as if it had been expressly authorized by the charter.
>
> "If the Company, for the purpose of increasing its business, had called upon the stockholders to pay up that part of their stock which had been satisfied 'by discount,' according to their contract the stockholders could have successfully resisted such a demand. No suit could have been maintained by the Company to collect the unpaid stock for such a purpose. The shares were issued as full paid, on a fair understanding, and that bound the Company.

"In fact, it has been held in recent English cases that not only is the Company, but its creditors also, bound by such a contract. Waterhouse v. Jamieson, L. R. 2 H. L., Sec. 29; Currie's Case, 3 De G., J. & S., 367; Carling, H. & W. cases, L. R. 1 Ch. Div. 115.

"But the doctrine of this court is, that such a contract, though binding on the Company, is a fraud in law on its creditors, which they could set aside; that when their rights intervene, and to satisfy their claims, the stockholders could be required to pay their stock in full. Sawyer v. Hoag, 17 Wall. 610 (84 U. S., XXI., 731); New Albany v. Burke, 11 Wall. 96 (78 U. S. XX., 155); Burke v. Smith, 16 Wall. 390 (83 U. S. XXI., 361).

"The reason is, that the stock subscribed is considered in equity as a trust fund for the payment of creditors. Wood v. Dummer, 3 Mason, 308; Mumma v. Potomac Co., 8 Pet. 286; Ogilvie v. Ins. Co., 22 How. 387 (63 U. S. XVI. 351); Sawyer v. Hoag, *ubi supra.* It is so held out to the public, who have no means of knowing the private contracts made between the corporation and its stockholders. The creditor has, therefore, the right to presume that the stock subscribed has been or will be paid up, and if it is not, a court of equity will at his instance, require it to be paid.

"In this case, the managers and agents of the bankrupt Company had in effect represented to the public that all its capital stock had been subscribed for and had been or would be paid in full. Considered, therefore, in the view of a court of equity, the contract between the Company and its stockholders was this, namely: that the stockholders should pay, say, for example, $20 per share on their stock and no more unless it became necessary to pay more to satisfy the creditors of the Company, and when the necessity arose, and the amount required was ascertained, then to make such additional payment on the stock as the satisfaction of the claims of creditors required.

"When the Company was adjudicated a bankrupt, the assignees were bound by this contract, thus equit-

ably construed. Their duty was to collect a sufficient sum upon the unpaid stock which, with the other assets of the Company, would be sufficient to satisfy the Company's creditors. They were authorized to collect no more. If it should turn out that the other assets were sufficient, no action would lie against the stockholder for the balance due on his stock. For, if in a bankruptcy proceeding any surplus remained after payment of debts, it would go to the Company, and not to the stockholders. And we have seen the Company in this case would have no right to any surplus.

"The question for solution is, therefore, when, under the facts of this case, did the cause of action accrue against the defendant in error? Certainly not until it became his duty to pay, according to the terms of his contract, or according to law.

"It is well settled that when stock is subscribed to be paid upon call of the Company, and the Company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. The Court will do what it is the duty of the Company to do. Curry v. Woodward, 53 Ala. 371; Robinson v. Bk., 18 Ga. 65; Ward v. Mfg. Co., 16 Conn. 593. But under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the Company, there must be some order of a Court of competent jurisdiction, or at the very least, some authorized demand upon him for payment. And it is clear the Statute of Limitations does not begin to run in his favor until such order or demand. Van Hook v. Whitlock, 3 Paige, 409; Salisbury v. Black, 6 Har. & J. 293; Sinkler v. Turnpike Co., 3 Pa. 149; Walter v. Walter, 1 Wharton 292; Quigg v. Kittredge, 18 N. H. 137; Nimmo v. Walker, 14 La. Ann. 589.

"In this case there was no obligation resting on the stockholder to pay at all until some authorized demand in behalf of creditors was made for payment.

The defendant in error owed the creditors nothing, and he owed the Company nothing save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the Company his obligation was to pay to the assignees, upon demand, such amount upon his unpaid stock as would be sufficient, with the other assets of the Company, to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete.

"But not only was it necessary that the amount required to satisfy creditors should be ascertained, but that the agreement between the Company and the stockholder to the effect that the latter should not be required to make any further payments on his stock should be set aside as in fraud of creditors. No action at law would lie to recover the unpaid balance due on the stock until this was done. The proceedings for an assessment in the bankruptcy court was, in effect, a proceeding to accomplish two purposes: first, to set aside the contract between the Company and the stockholder; and, second, to fix the amount which the stockholder should be required to pay. Until these things were done the cause of action against the stockholder did not accrue, although his primary obligation was assumed at the time when he subscribed the stock.

"It appears from the petition of the assignees, plaintiffs in error, for an assessment upon the stock of the bankrupt Company, that they had used due diligence to ascertain what additional payments on the stock would be required to pay off the claims of creditors; that at as early a time as possible they applied to the Court for an order directing that the stockholders should pay a part of the amount due on their shares of stock, and assessing the stock therefor; that the order was made accordingly, and within five months thereafter this action at law was begun to enforce its payment.

"If, therefore, the right to bring this suit did not accrue to the assignees until the assessment was made upon the stock by the Court and the stockholders required to pay it, the action was brought long before the limitation of the statute could bar it.

"All the delay which has occurred has been caused by the proceedings of the assignees, taken for the benefit of the stockholders, in order that they might not be subjected to unnecessary and onerous exactions. The lapse of time between the filing of the petition for the assessment and the decree of the bankruptcy court thereon is chargeable to continuances made by order of the Court and to the opposition of the stockholder referred to. It does not lie in the mouth of the defendant in error to say that while the steps necessary to fix his liability and limit its amount were being taken, the bar of the statute has intervened and cut off his liability altogether.

* * * * * * * *

"The case of Terry v. Anderson, 95 U. S. 628 (XXIV., 365), also relied on by defendant in error, was a suit in equity to enforce the individual liability of the stockholders of a bank and to collect unpaid subscriptions to its capital stock. There was no agreement on the part of the bank not to collect the balance due on the stock. The bank itself could have enforced payment, without regard to the necessity for its collection, to satisfy the debts of the bank. And so the Court held that the Statute of Limitations began to run against the bank and its creditors, in favor of the stockholder, when the bank stopped payment.

* * * * * * * *

"But in the present case, as we have seen, as between the Company and its stockholders there was no obligation on the part of the latter to pay the residue of their stock, unless it became necessary to satisfy creditors. We think, therefore, we are safe in saying that the statute did not begin to run in favor of the stockholders until at the very least the neces-

sity for the payment had been ascertained, and an authorized demand of payment made.

"It is said by defendant in error, that to hold that the suit to recover the sums due on the stock held by him is not barred, would defeat the policy of the Bankrupt Act, which is a speedy settlement of the bankrupt's estate, and the equitable distribution of his assets among the creditors.

"Unquestionably a prompt administration of the bankrupt's assets was one of the ends which the Bankrupt Act had in view; but this policy must be held to be subordinate to a just regard for the rights of both the creditors and debtors of the bankrupt estate. The debtor cannot be forced to pay before his contract requires it, merely because the assignee may be in haste to close up the estate. If his obligation were evidenced by a promissory note due at a future day he could not be compelled to pay it before maturity in order that the bankrupt estate might be speedily settled. So if some act must be done by the assignee, such as a demand of payment before his liability is fixed, he cannot be compelled to pay until the prerequisites have been performed. In short, until an unconditional liability to pay something is fastened on the debtor, no action can be maintained against him, and the Statute of Limitations does not begin to run in his favor. The suggestion that the assignee may postpone indefinitely the necessary steps to fix the liability of the debtor and thus defeat the policy of the law, does not answer the proposition that the debtor cannot be sued until a cause of action has accrued against him. It is presumed that the assignee will do his duty. If he fails to do it, he is subject to the order of the bankruptcy Court, which, at the instance of those interested, can compel him to act."

That there is a conflict in the opinions on this subject in the United States shows by reference to the case of KAYE v. METZ (Cal. Sup. Ct.), 198 Pac. 1047; 47 A. B. R. 163. In that case there was a plenary action brought by a

trustee in bankruptcy in a State Court upon an assessment levied by a Referee in Bankruptcy against stockholders of a bankrupt corporation to recover the balance due on capital stock. The bankruptcy Court, on petition duly filed, had ordered the trustee to call in the entire assessment if necessary for the payment of debts.

This order was made after a contest in the bankruptcy Court. In the State Court the defendants contended the action was barred by the Statute of Limitations. The trial Court found in favor of the trustee-plaintiff and gave judgment accordingly. On appeal, the judgment of the lower Court was affirmed. In its opinion the Supreme Court says:

> "The appellants contend that the action is barred by Section 339 of the Code of Civil Procedure, the two year Statute of Limitations. Appellant's theory is that the cause of action accrued and the period of limitation began to run as soon as the corporation was adjudged a bankrupt, if not before. The adjudication occurred more than two years before the action was begun. This proposition is settled against the appellants by the decision in Union Savings Bank v. Leiter, 145 Cal. 696, 79 Pac. 441. In that case the bank had been adjudged insolvent under the Bankruptcy Act of 1878, as amended in 1887 and 1895 (Stats. 1895, p. 172), and, as provided in that act, the directors proceeded to settle its affairs. The proceedings under the Act, was, in effect, a proceeding in insolvency, and the result was that ordinary actions could not thereafter be maintained against the bank, except as provided in the Act. It was in legal effect the same as an adjudication in bankruptcy. People v. Superior Court, 100 Cal. 105; 34 Pac. 492; Long v. Superior Court, 102 Cal. 457, 36 Pac. 807; Crane v. Pacific Bank, 106 Cal. 69; 39 Pac. 215; 27 L. R. A. 562; Argue v. Union Savings Bank, 133 Cal. 139; 65 Pac. 307. The directors, in pursuance of their duties under the Act, made a call for payment upon the stock subscriptions for the purpose of obtaining funds to pay the corporate debts.

Upon the failure of Leiter to pay the amount called the action was begun. It was held (145 Cal. 705; 79 Pac. 441) that the Statute of Limitations did not begin or run against such action at the time of the adjudication that the bank was insolvent, nor until such time as directors, acting as trustees in liquidation under the Act, had duly made a call for payment by stockholders upon their subscription liability and that the action was not barred until two years from the time of making such call. This case cannot be distinguished from the case at bar. In the present case the call for the enforcement of which this action was begun was made by the trustee in bankruptcy under the directions of the Court less than two years prior to the filing of the complaint. Consequently, it is not barred."

The proceedings in the Bankruptcy Court were between the same parties and upon the same subject matter as they were in the Court of Common Pleas and the Supreme Court of the Commonwealth of Pennsylvania. The respondent urged the same defenses to the assessment that he did to the plenary suit. The questions raised by these defenses were resolved against him by the Referee in Bankruptcy, the United States District Court, and the United States Circuit Court of Appeals. In the Court of Common Pleas he raised the additional defense of the plea of the bar of the Statute of Limitations. Those Courts swept aside all of the defenses, as did the United States Courts, with the exception of the plea of the bar of the Statute of Limitations. Therefore, the only question in the case at bar is whether the State Courts could go behind a decree of the United States Court as the basis of an action and establish a different time for the running of the Statute of Limitations, or whether the Statute ran from the time of the entry of the final decree. The trustee-petitioner contends that when, by the decree of the Circuit Court of Appeals, he was relegated to a plenary suit at law, the only defenses available to the respondent were, want of jurisdiction in the Court to make the order, pay-

ment, or the plea of the bar of the Statute of Limitations from the date of the decree.

If this judgment of the Supreme Court of the Commonwealth of Pennsylvania is permitted to stand, not only is there a conflict of opinions on this question in the United States in the administration of bankruptcy, but it is contrary to the law laid down by this Court in SCOVILL v. THAYER, *supra*, and it would tend to render proceedings in bankruptcy, insofar as this class of cases is concerned, futile, because of the delays incident to the administration of a complicated estate in bankruptcy, and in addition it would permit the person proceeded against to cause delay by appeals, as this respondent did, and take advantage thereof. Attention of the Court is called to the fact, and stressed strongly, that the action brought was solely upon the decree of the United States Court, and the State Courts, by their action, have decided that the action should have been brought upon the respondent's original obligation to pay. The Statute of Limitations of Pennsylvania is as follows (Act of March 27, 1713; 1 Sm. L. 76, par. 1):

> "All actions of trespass *quare clausum fredit*, all actions of detinue, trover and replevin, for taking away goods and cattle, all actions upon account and upon the case (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants), all actions of debt grounded upon any lending, or contract without specialty, all actions of debt, for arrearages of rent, except the proprietaries' quit-rents, and all actions of trespass, of assault, menace, battery, wounding and imprisonment, or any of them, which shall be sued or brought at any time after the five and twentieth day of April, which shall be in the year of our Lord one thousand seven hundred and thirteen, shall be commended and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case, other than for slander, and the said actions for account, and the said actions for trespass, debt, detinue and replevin, for goods or cattle,

and the said actions of trespass *quare clausum fregit* within three years after the said five and twentieth day of April next, or within six years next after the cause of such actions or suit, and not after."

It will be noted from a reading of the statute that it runs from the cause of action as laid. The State Courts fell into error by refusing to recognize the real cause of action, the decree of the Federal Court.

The trustee-petitioner contends that before suit could be brought against the respondent, there had to be some order of a Court of competent jurisdiction. As laid down in SCOVILL v. THAYER, 105 U. S. 143, 156, and HARRIGAN v. BERGDOLL, 263 Fed. 279, 281, it was the duty of the trustee-petitioner, in dealing with assets, to proceed under the direction of the Bankruptcy Court. In HARRIGAN v. BERGDOLL, 263 Fed. 279, 281, the United States Circuit Court of Appeals for the Third Circuit, in an opinion by Haight, Circuit Judge, laid down the rule as follows:

> "There are two entirely separate and distinct branches of the proceedings to compel the payment by a stockholder of a bankrupt corporation of any moneys due on his stock, viz.: First, a determination by the Court as to whether it is necessary to assess such stock for the purpose of paying the debts of the bankrupt and the necessary costs of administration, and, if so, then the fixing of the rate of the assessment and the levying of the same upon whatever stock may appear *prima facie* to be subject thereto; and, second, if a stockholder disputes his individual liability as *prima facie* determined, then the institution by the trustee of an appropriate suit or proceeding to fix definitely his liability or non-liability for the assessment and the amount thereof. The first branch is purely administrative and is binding upon any stockholder in any subsequent proceedings instituted to fix his personal liability; but in respect to the second branch the stockholder may make any defense which

may effect his individual liability, other than the correctness of the administrative order. In re Newfoundland Syndicate, 201 Fed. 917; 120 C. C. A. 225 (C. C. A., 3rd Cir.); in re M. Stipp Const. Co., 221 Fed. 372; 137 C. C. A. 180 (C. C. A. 3rd Cir.)."

The trustee-petitioner, under the rules laid down by these two decisions and numerous others by the United States Courts, could not have maintained a plenary action against the respondent until he had obtained the order for assessment as he did. Being a trustee in a Federal bankruptcy proceeding, the proceedings he took and the order he obtained were a right given to, and exercised by him under the authority of a Federal Statute, and he contends that his cause of action arose when he obtained this final order of the Circuit Court. In the case of GREAT WESTERN TELEGRAPH CO. v. BENNHAM, 162 U. S. 329, where the Illinois State Court ordered an assessment on corporate stock, and this order was attempted to be enforced against the defendant in the Iowa State Court, who pleaded the bar of the Iowa State Statute of Limitations, the United States Supreme Court ruled that limitation of actions is governed by the *lex fori*, and is controlled by the legislation of the State in which action is brought as construed by the highest Court of that State, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions; and that the time when a cause of action accrues under a State Statute is not a Federal question, but is a local question, on which the decisions of State Courts cannot be reviewed by the Supreme Court of the United States. But there is a great distinction between that case and the instant case. Here we have a *Federal* bankruptcy, ruled by the Federal Statutes and decisions thereon, and the decision of the Pennsylvania Supreme Court was a discrimination against a right asserted under the laws of the United States; whereas, in the case cited *supra*, the assessment was made by the Court of one state and attempted to be enforced in the Court of another state.

What petitioner emphasizes is that, under the facts of the present case, the cause of action against Bergdoll could not have been enforced by the bankrupt corporation.

This, it is submitted, is expressly ruled in SCOVILL v. THAYER, *supra*, and is also similarly ruled and thoroughly discussed in the case of PARSONS v. HAYES, 14 Abbotts New Cases (N. Y.) 419, where the corporation issued $2,000,000 of full paid stock for property rightly valued at $150,000, and suit was brought by subsequent *bona fide* purchasers of the stock against the trustees who were parties to the fraudulent issue. The Court there explained that the corporation had not been damaged inasmuch as, even if the correct amount of full paid stock had been issued, the corporation would not have had more than $150,000 worth of property, and in addition, that since corporations must act through natural persons, the acts of the trustees were acts of the corporation and the corporation being a party to the contract of issue, although fraudulent as to creditors, would be estopped from avoiding its contract, and that the particular plaintiffs having sued on behalf of all stockholders were acting in place of the corporation, and since the corporation could not maintain the suit in its own name, the Court denied recovery to the plaintiffs.

The Pennsylvania Court, in the instant case, has laid down a general rule of law that where a stockholder and corporation have entered into a contract, fraudulent as to creditors but absolutely binding on themselves, whereby the stockholder receives an amount of full paid and non-assessable stock disproportionately larger than the fair value of property turned over, the Statute of Limitations on this secret transaction begins to run against innocent creditors who can act only by Court order, from the time of adjudication of insolvency.

This Court, starting with SWIFT v. TYSON, 16 Pet. 1, has held that the 34th Section of the Judiciary Act of 1789, Chapter 20, providing "that the laws of the several states except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decisions in trials at common law,

in the Courts of the United States, in cases where they apply (Revised Statutes, Par. 721) * * *;" this section, upon its true intendment and construction, is strictly limited to local statutes, and local usages of the character bebefore stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."

It is to be observed that the Statute of Limitations relied on by the Pennsylvania Court does not attempt to define the time when the causes of action therein enumerated shall arise. Therefore, this Court is not now concerned with the construction of a State Statute but with the antecedent general question of when a cause of action arose in a proceeding under the Bankruptcy Act upon which the State Statute afterwards operated.

The question for the Court's determination was, what was the cause of action and when did it arise? It is clear that it arose in bankruptcy, and whether the cause of action arose at the date of insolvency or the date of the decree is purely a Federal question, and not for the State Court to determine.

We quote the following cases of this Court affirming the principle laid down in SWIFT v. TYSON.

In OLCOTT v. SUPERVISORS, 16 Wall. 678, it was held:

> "The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no State Court can conclusively determine for this Court."

IN RAILROAD v. LOCKWOOD, 17 Wall 357, where the question was whether a common carrier could relieve itself by contract from negligence, this Court said:

> "But on a question of general commercial law, the Federal Courts administering justice in New York have equal and coordinate jurisdiction with the Courts

of that State; and in deciding a case which involves a question of such importance to the whole country; a question on which the Courts of New York has expressed such diverse views, and have so recently and with such slight preponderancy of judicial suffrage, come to the conclusion that they have, we should not feel satisfied without being able to place our decision upon grounds satisfactory to ourselves, and resting upon what we consider sound principles of law."

In BOYCE v. TABB, 18 Wall. 548, recovery was had on a promissory note, the consideration of which was the price of slaves. Slavery existed when the note was delivered but had been abolished when payable and the State Court by decision of its highest tribunal had refused recovery in such cases on ground of public policy. This Court, citing SWIFT v. TYSON, disregarded the local decision and affirmed the recovery allowed in the Circuit Court.

To the same effect, see

OATES v. NATIONAL BANK, 100 Otto 239;
COUNTY OF PRESIDIO v. NOEL-YOUNG, *et al.*, 212 E. S. 58.

Reaffirming SCOVILL v. THAYER, *supra*, the Court is asked to say, as a general rule of law in cases such as this, that the true cause of action is the decree obtained under the Federal Bankruptcy Law, and that no State Statute of Limitations begins to run against such a decree until the date it becomes final; this, to the end that there shall be a uniform administration in Federal Bankruptcy throughout the country.

It is respectfully submitted that the trustee-petitioner, having proceeded and obtained, under a Federal Statute, a right of action, and having been erroneously denied his

rights on that cause of action, the judgment of the Supreme Court of the Commonwealth of Pennsylvania should be reversed with directions to that Court to reverse the judgment of the Court of Common Pleas No. 4, of Philadelphia County, with instructions to enter judgment on the verdict in favor of the trustee-petitioner and against the respondent, for the sum of $192,909.24 with interest thereon from February 15, 1923.

FRANK A. HARRIGAN,
JOSEPH W. CATHARINE,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1925. No. 161.

FRANK A. HAMMAN, Trustee of the Bankrupt Estate of the LOUIS J. BERGDOLL MOTOR COMPANY,

Petitioner,

vs.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGDOLL,

Respondent.

REPLY TO RESPONDENT'S BRIEF ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

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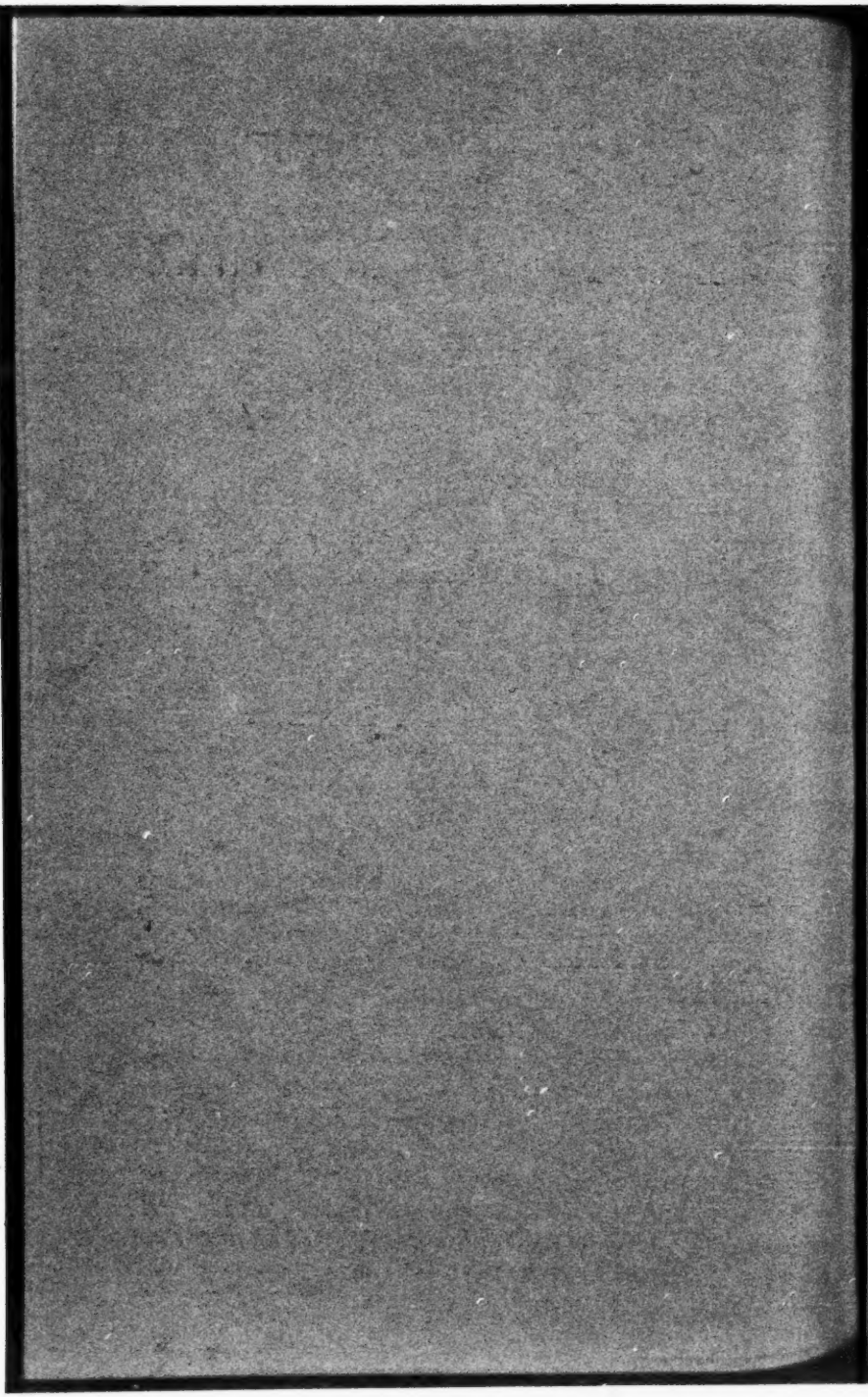

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925. No. 181.

FRANK A. HARRIGAN, Trustee of the Bankrupt Estate of the LOUIS J. BERGDOLL MOTOR COMPANY,
Petitioner,

v.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGSON,
Respondent.

REPLY TO RESPONDENT'S BRIEF ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

The respondent is confused as to the real question in issue. The proposition, re-stated, is as follows: That where a Federal court establishes a right of action for a trustee in Bankruptcy under the Bankruptcy law, which right of action must be enforced in a State court by suit, the State court is without power to go behind the decree giving such right, as established by the Federal court, and say that the trustee's cause of action arose at a different time.

The argument of the respondent (Brief, 7-8-9-10) is given over to a discussion of the power of this court to review a decision of the State court. With the proposition therein advanced the petitioner largely agrees, but the cases therein cited are all distinguishable from the case at

bar and the Federal question involved in the instant ca arises from the fact that the State courts of Pennsylvani refused to recognize the cause of action established by t Federal courts for the Eastern District of Pennsylvani under the Bankruptcy law, giving the trustee the right sue. Indeed, until he had that power and authority co ferred on him in Bankruptcy he had no right nor cause action whatever, and the petitioner asserts that the deni of his right, as established by the Federal law, was such denial of a right under a Federal statute as gives this cou jurisdiction. And, furthermore, the action of the Stat courts rendered the proceedings in Bankruptcy, to the en of collecting on this stock liability, futile and of no effect.

That the action at bar was brought upon the decree o the United States Court is clearly set out by the declaratio or statement of claim filed originally in the Court of Com mon Pleas No. 4 of Philadelphia County (R. 2), thus show ing that there was no other right of any kind in the peti tioner-trustee. On page 10 of respondent's brief it is state that the action is on the contract, not on the assessmen proceedings. This is without warrant because, at the tim of Bankruptcy, there was no obligation on the part of Berg doll to pay the corporation anything. So far as it and h were concerned, he owed it nothing. It was only when i was discovered in the course of Bankruptcy proceeding that he had paid but $144,428.03 for his stock instead o $300,000.00, and that there was not enough to pay creditors that he was obligated to pay anything. His liability i created by law and not by any contract between him an the corporation. This is the rule laid down by your Honor able Court in Scovill v. Thayer, 105 U. S. 143.

On pages 11-12-13 of respondent's brief, it is state that the proceedings to assess were unnecessary. This ma be true in many cases; but in a Federal Bankruptcy pro ceeding, as set forth in Scovill v. Thayer, supra, no suit may be brought by a trustee in bankruptcy, under circum

stances as stated therein which are identical with the present case, *until there is an authorized demand or an order of the court.* And again, it is a safer practice, before suits are brought by trustees in Bankruptcy, to notify all creditors and have the authority of the judicial officer before taking proceedings which will necessarily call for the expenditure of the moneys of the bankrupt estate.

The proceedings to fix the respondent's liability were brought only when everything else in the Bankruptcy matter had been closed, all the claims reduced, and all other assets collected. From then on he vigorously resisted the right to an assessment and the right of the trustee to a summary order to pay, both of which orders were finally entered by the Referee. Had any one of the defenses raised by him to these proceedings been successful at any time in the United States Courts, the matter would have been finally ended and no plenary suit would have been necessary; and had the Circuit Court of Appeals finally sustained the trustee in bankruptcy as to the summary order to pay, Bergdoll's liability would have been fixed and the entire matter ended. Certainly, the trustee could not have sued while these proceedings were pending, and the appeals taken by Bergdoll delayed the suit at least two years and five months. That he should have advantage of this is unthinkable.

At page 17 of respondent's brief he states that the determination of the time when the action accrued was a question of local law. The trustee-petitioner asserts that this suit, having been brought upon a decree of the United States Court establishing a cause of action between the same parties, the State court was not concerned with anything behind that date; and that it was without power to say, after the decree of the Federal court, that the right of action in the petitioner began at a time long antecedent. There is no question in this case on the part of the petitioner on the wrongful application of the State statute of limitations. The single question is as in Scovill v. Thayer, supra: When did the right of action accrue? This having been

established by the Federal court, the statute began to run from that time.

At page 21 of respondent's brief it is stated there was no basis for the verdict, and refers particularly to the amount. It appeared from the books of the corporation that for $300,000.00 worth of stock the respondent turned over assets amounting to $144,428.03, this being the value placed upon the assets by himself at the time. A better standard for fixing the deficiency than the difference between this amount and $300,000.00 it is hard to see (R. 23).

At pages 22-23 of respondent's brief he attempts to show that the matter was *res adjudicata*. This is without any basis in fact. The facts are, that early in the proceedings Bergdoll presented a claim against the bankrupt estate for $395,860.00, alleging that the present bankrupt was indebted to him in that amount (R. 81). The petitioner-trustee filed an answer, alleging that (1) $300,000.00 of said amount was contributed to the capital stock of the Louis J. Bergdoll Motor Company of New Jersey; that (2) certain items of said claim were paid by merchandise; and (3) that $70,000.00 was in exchange for a check. The Referee in Bankruptcy in an opinion (R. 83 to 95) found (R. 93) that the $300,000.00 was contribution to capital stock and not a debt. He reduced the claim of $395,860.00 to $10,000.00, and the date of the finding was January 7, 1915, early in the proceedings and two years before the petition to assess the respondent was filed, to wit: October 22, 1917. There was never any question raised in the proceedings before the latter date as to the liability of the respondent to pay. It was mere dicta on the part of the Referee that the stock of the Pennsylvania corporation which took over the New Jersey company's assets was fully paid. This same question of *res adjudicata* was raised by the respondent before the Referee in Bankruptcy, the United States District Court on petition to revise, the Circuit Court of Appeals on review, and the Court of Common Pleas No. 4

of Philadelphia at the time of the trial, all of which tribunals decided that it was without merit and did not enter into the case. The point adjudged in the Referee's opinion the respondent refers to was whether his claim of $395,860.00 was made up largely of money loaned or contributions to capital stock, and the Referee found the latter. On this subject of *res adjudicata* your Honorable Court has expressed itself in North Carolina R. Co. v. Story, 45 S. Ct. page 533, Advance Sheets No. 16, June 15, 1925:

> "It is well settled that the principle of res adjudicata is only applicable to the point adjudged and not to points only collaterally under consideration, or incidentally under cognizance or only to be inferred by arguing from the decree. Hopkins v. Lee, 6 Wheat. 109, 114, 5 L. Ed. 218; Norton v. Larney, 266 U. S. 511, 517, 45 S. Ct. 145, 69 L. Ed.—. The reasoning and opinion of the court are not res adjudicata unless the subject-matter in issue be definitely disposed of by the decree. Keane v. Fisher, 10 La. Ann. 261; Bridges v. McAlister, 106 Ky. 791, 51 S. W. 603, 45 L. R. A. 800, 90 Am. St. Rep. 267; Probate Court v. Williams, 30 R. I. 144, 73 A. 382, 19 Ann. Cas. 554; Scottish-American Mortgage Company v. Bunckley, 88 Miss. 641, 41 So. 502, 117 Am. St. Rep. 763; Braun v. Wisconsin Rendering Company, 92 Wis. 245, 66 N. W. 196; Citizens' Bank of Emporia v. Brigham, 61 Kan. 727, 60 P. 754."

The petitioner never took the position that the contribution to capital stock of the New Jersey company paid up the stock of the respondent's Pennsylvania company. His position always was that the only consideration received by the Pennsylvania company from the respondent was assets of the New Jersey company amounting to $144,428.03 and that this was clearly insufficient, and that therefore he was liable to pay to the trustee the difference for the benefit of creditors.

Statutes of Limitation are made to protect people from stale demands. The suit in the State court was between the same parties and involved the same subject matter as the proceedings in the United States court in Bankruptcy. All these proceedings were had to the end that the respondent might be compelled to pay the creditors of the corporation; and step by step, in accordance with the law and the Rules of court, this was done. Each step was resisted vigorously by the respondent. He knew everything about the proceedings in Bankruptcy and the proceeding in the State court, from the start to the finish.

It is respectfully suggested that there could be no safer practice established in Bankruptcy for suits of this kind than laid down by the Court in Scovill v. Thayer, supra, and that by the reversal of this decree there will be a reaffirmation of the principles therein contained.

Respectfully submitted,

FRANK A. HARRIGAN,
JOSEPH W. CATHARINE,
Attorneys for Petitioner.

OCT 13 1924

WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, [redacted] 1924 [redacted] 181

FRANK A. HARRIGAN, Trustee of the bankrupt estate of THE LOUIS J. BERGDOLL MOTOR COMPANY, a corporation organized under the laws of the State of Pennsylvania,

Petitioner,

vs.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGSON,

Respondent.

RESPONDENT'S BRIEF CONTRA APPLICATION FOR WRIT OF CERTIORARI.

HARRY C. KOHLHAS, JR.,
WALTER S. GIBSONS,
Attorneys for Respondent.

Martin & Lyle, 618 Penfield Bldg., Phila., Wal. 0057, Keystn. Race 0057.

IN THE

Supreme Court of the United States

October Term, 1924. No 668.

FRANK A. HARRIGAN, Trustee of the bankrupt estate of THE LOUIS J. BERGDOLL MOTOR COMPANY, a corporation organized under the laws of the State of Pennsylvania,

Petitioner,

vs.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGSON,

Respondent.

RESPONDENT'S BRIEF CONTRA APPLICATION FOR WRIT OF CERTIORARI.

No Federal Question is Involved in the Decision of the Court Below.

The sole question raised by the petitioner in the Supreme Court of Pennsylvania and the only point involved in the decision of that Court is the construction of the Statute of Limitations of that State, in actions of debt, with particular reference to the time when the period of limitation begins to run. The pe-

titioner does not state in the petition filed upon what theory he contends that this Court has a right to review the decision of the Court below, nor does he indicate what provision of Section 709 of the Revised Statutes, as amended by the Act of 1875, could give this Court such authority. The nearest approach to a federal question in this case suggested by the petitioner is his present contention that as a trustee in bankruptcy the Statute of Limitations of the State of Pennsylvania and the decisions of the Supreme Court of that State are not binding upon him.

Before considering this contention, it is necessary to make a brief statement of the principal facts disclosed by the record as some of the statements contained in the petition and some of the assumptions underlying the petitioner's version of the questions involved are not supported by the record.

The respondent subscribed for 3,000 shares of the common capital stock of the Louis J. Bergdoll Motor Company, a corporation of the State of Pennsylvania (now bankrupt), in March, 1912, and in payment of this subscription transferred the entire capital stock (which was owned by him) in a New Jersey corporation of the same name, and with this transfer of stock there was transferred to the bankrupt all of the assets of the New Jersey corporation. Prior to this transfer the respondent had paid into the treasury of the New Jersey corporation more than $300,000 in cash. On January 8th, 1913, the respondent assigned his stock to others. On April 11, 1913, the corporation was adjudicated bankrupt upon default of an answer being filed to a creditors' petition and Frank A. Harrigan, Esq., who had been appointed receiver was thereafter elected Trustee.

The claims of creditors filed against the bankrupt estate greatly exceeded the assets of the bankrupt

coming into the hands of the trustee and it was at once apparent to all concerned that there would be a substantial deficit, even though the estate should succeed in certain litigation and in defeating certain contested claims. All of this litigation terminated favorably for the bankrupt estate.

No assessment upon the stock of the bankrupt company was ever made by the bankrupt company or its directors, or by any other authority, nor did the trustee in bankruptcy take any steps to cause any assessment to be made until he filed his petition for an assessment on October 22, 1917, which was a period of four years and six months after the adjudication of bankruptcy, notwithstanding the fact that during that time it was well known to the trustee that the assets of the bankrupt estate would not be sufficient to pay the claims of creditors.

The respondent was a creditor of the bankrupt at the time the petition for assessment was filed and as a creditor of the bankrupt he exercised his legal right to contest the advisability of the assessment proceedings. The referee, however, upheld the propriety of the assessment and then at the instance of the petitioner made an order specifically decreeing that Louis J. Bergdoll (this respondent) be assessed for 51.85% of the par value of 3,000 shares of capital stock of the company and specified that such assessment amounted to $155,571.97, with interest thereon from April 1, 1912 (the date the stock was issued) and further ordered that respondent pay to the trustee, petitioner, the said amount with interest from April 1, 1912, to wit, the sum of $219,771.34. The petitioner was seeking in summary proceeding to accomplish results which could only be secured in a plenary proceeding in the proper court and an appeal was taken to the United States District Court and from thence

to the Circuit Court of Appeals and before the last-named tribunal the decree of the District Court was reversed in so far as it fixed the personal liability of this respondent and in so far as it fixed the amount of the assessment, but affirmed the decree in so far as it adjudicated the necessity for an assessment on the stock of the bankrupt, the rate thereof and those who appeared *prima facie* subject to the assessment.

The mandate was issued on the 27th day of March, 1920, and the present suit was not entered until the 13th day of July, 1921, a period of eight years and three months after the adjudication of bankruptcy. At the trial of the cause a verdict was rendered for the petitioner, but the Court of trial subsequently entered judgment for the respondent, holding that the claim was barred by the Statute of Limitations, which decision was sustained by the Supreme Court of Pennsylvania upon that ground.

The general Statute of Limitations of the State of Pennsylvania, to wit, the Act of March 27, 1713, Section 11, Smith's Laws 76, provides that:

> "* * * all actions of debt founded upon any lending or contracting without specialty * * * shall be commenced and sued within the time and limitation hereinafter expressed and not after, that is to say * * * debt * * * within six years next after the cause of such action or suit and not after * * *."

Construing this Statute, the Supreme Court of Pennsylvania has uniformly ruled that the right of action by the creditors for unpaid subscriptions to stock of a corporation accrues and the limitation begins to run from the date of insolvency.

See

SWEARINGEN vs. DAIRY CO., 198 Pa. 68 (1901);
NEWTON'S ESTATE, 46 Pa. Super. Ct. 40 (1911).

The Court below so ruled in this case and this ruling is the cause of petitioner's complaint here.

Petitioner does not challenge the validity of the above Statute of Limitations on the theory that it is repugnant to the Constitution of the United States, which would be the only basis for this Court to take jurisdiction of this case. Yet the decision asked to be reviewed is the decision that the Statute of Limitations began to run from the date of insolvency which was judicially declared by the United States District Court to be April 11, 1913.

Petitioner cites the case of RECTOR vs. CITY DEPOSIT BANK COMPANY, 200 U. S. 405, in support of his contention that this Court should review the proceedings in the Supreme Court of Pennsylvania on the theory that the peitioner is a trustee in bankruptcy appointed under the bankruptcy laws of the United States, seeking to recover what was asserted to be an asset of the bankrupt estate under that law. In the case cited, this Court held that a federal question was raised under the bankrupt law, which was sufficient to support a writ of error to a State Court where the judgment of the State Court was against the trustee in bankruptcy in an action to recover property from a creditor on the ground of a fraudulent preference. That was a right under the federal bankrupt law which was denied by the State Court, but in the instant case no right under any federal statute has been denied the petitioner. The right to recover

the unpaid balance upon a stock subscription is under the general law of the State of Pennsylvania and as such is not reviewable by this Court.

> Gibson vs. Chouteau, 13 Wall. 92;
> The Winnebago, 205 U. S. 354.

In the case of "THE WINNEBAGO", last cited, this Court held that the decision by a State Court upon a statute of limitations is conclusive. In the opinion by Mr. Justice Day dismissing a writ of error to the Supreme Court of the State of Michigan, it is said:

> "Several objections are urged by the plaintiff in error which, if sustained, will result in the reversal of the judgment of the Supreme Court of Michigan. Some of them are of a non-Federal character. It is insisted that the statute does not apply in this case, because the steamer Winnebago was not to be used in navigating the waters of Michigan, within the terms of the statute. But this only presents a question of state law, upon which the judgment of the state court is final and conclusive. The same may be said as to the objection because the transportation company was a bona fide purchaser without notice of complainant's lien, and because complainant did not within a year file its claim for a lien with the proper court in the county in which it resided. These are state questions, likewise concluded by the decision of the state court."

It is submitted, therefore, that no federal question is involved in the decision of the Court below either in construing its statute of limitations or in declaring the general law with respect to unpaid stock subscriptions, which is reviewable by the Supreme Court of the United States.

THE FACT THAT THE DECISION OF THE COURT BELOW DOES NOT FOLLOW A RULE OF THE GENERAL LAW LAID DOWN BY THE SUPREME COURT OF THE UNITED STATES IN ANOTHER CASE DOES NOT PRESENT A QUESTION REVIEWABLE BY THIS COURT.

Petitioner complains that he was misled by the decision of this Court in the case of Scoville vs. Thayer, 105 U. S. 143, and that therefore the Court below erred in denying him the right to proceed after the time within which to bring such a suit had expired under the local statute of limitations. The case of Scoville vs. Thayer does not bear out the petitioner's contention. In that case it was necessary to have an assessment before suit could be brought and it was also necessary that certain litigation be terminated before the necessity for an assessment could be ascertained. Further than this, proceedings in that case were carried on with due diligence in a federal court. In the instant case petitioner, without any reason, delayed the filing of his petition for four and a half years after his appointment and then delayed nearly four years more before instituting suit, although under the Pennsylvania law there was no necessity for the assessment proceedings prior to the institution of suit.

See

Citizens & Miners Savings Bank vs. Gillespie, 115 Pa. 564.

This rule of the State of Pennsylvania was recognized and affirmed by this Court in Potts vs. Wallace, 146 U. S. 689.

But, even though the decisions in the federal courts sustained the contention of the petitioner, this court

has held that the refusal of the state courts to follow a rule of general law laid down by this Court in other cases does not present a question reviewable by this Court. Thus, in the case of Pennsylvania Railroad Co. vs. Hughes, 191 U. S. 477, this Court, in affirming the judgment of the Supreme Court of Pennsylvania in declining to follow the rule laid down by the Federal Courts in reference to the liability of the common carriers, held that the Supreme Court of Pennsylvania may administer the common law according to its understanding and interpretation of it, being only amenable to review in the Federal Supreme Court where some, right, title, immunity, or privilege, the creation of the federal power, has been asserted and denied.

The petitioner contends that his action in attempting to collect this claim in the summary proceeding before a referee, which action was held by the Circuit Court of Appeals to be illegal, excuses him for his failure to institute suit within the period prescribed by the Statute of Limitations of the State of Pennsylvania. It is submitted that the doing of a useless thing which does not constitute the institution of suit can neither have any bearing upon the time when the Statute of Limitations begins to run nor can it stop the running of the statute. The decision of the Supreme Court of Pennsylvania, however, we submit, is conclusive as to these questions.

It is therefore respectfully submitted that the application for writ of certiorari to your Honorable Court should be denied.

HARRY C. KOHLHAS, JR.,
WALTER B. GIBBONS,
Attorneys for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1925. No. 181.

FRANK A. HARRIGAN, Trustee of the Bankrupt Estate of the LOUIS J. BERGDOLL MOTOR COMPANY,

Petitioner,

v.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGSON,

Respondent.

RESPONDENT'S BRIEF ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

HARRY C. KOHLHAS, JR.,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925. No. 181.

FRANK A. HARRIGAN, Trustee of the Bankrupt Estate of the LOUIS J. BERGDOLL MOTOR COMPANY,
Petitioner,

vs.

LOUIS J. BERGDOLL, now known as LOUIS J. BERGSON,
Respondent.

RESPONDENT'S BRIEF ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

This case was decided by the Supreme Court of Pennsylvania and the Opinion is reported as HARRIGAN, TRUSTEE, APPELLANT v. BERGDOLL, 281 Pa. 186, at page 187.

The final judgment, dated February 13th, 1924 (R. 130), was entered in the Court of Common Pleas No. 4 of Philadelphia County and was affirmed by the Supreme Court of Pennsylvania in an Opinion filed July 8th, 1924 (R. 128).

The Petitioner sued to recover an alleged unpaid balance due upon a stock subscription. Suit was brought in the State Court of the State of Pennsylvania where the corporation was domiciled and where the parties to the

proceedings resided (R. 2) and where the contract was entered into.

The corporation was adjudicated bankrupt on April 11th, 1913 (R. 56) and the suit was instituted July 13th, 1921 (R. 1). The Pennsylvania courts ruled that the Statute of Limitations of the State of Pennsylvania was applicable to this suit; that the right of action, if any, accrued at the time of the adjudication in bankruptcy and that the suit not having been brought until more than six years after the cause of action arose is barred by the Pennsylvania Statute of Limitations (R. 125 and 128).

The Petitioner now contends in his brief that as he is a Trustee in bankruptcy the Statute of Limitations of the State of Pennsylvania is not applicable to the case at bar, but does not set forth any citation from the Record showing that he made such contention in the Supreme Court of the State of Pennsylvania or in the lower court. His sole contention there was that the Statute of Limitations of the State of Pennsylvania did not begin to run until the date of the final judgment of the United States Circuit Court of Appeals sustaining the Referee's order for an assessment (R. 129). The Supreme Court of the State of Pennsylvania ruled that the right of action, if any, accrued at the time the company was adjudicated a bankrupt and the estate was found to be insolvent, viz: April 11th, 1913 (R. 129 and 130).

The petitioner contends that under paragraph 237 of the Judicial Code, this Court has jurisdiction to review the final judgment of the Supreme Court of Pennsylvania on the ground that a Federal question is presented merely because he is a trustee in bankruptcy seeking to recover an asset of the bankrupt estate, and cites the cases of RECTOR, TRUSTEE v. CITY DEPOSIT COMPANY, 200 U. S. 411 and RECTOR, TRUSTEE v. COMMERCIAL NATIONAL BANK, 200 U. S. 423, as authority therefor. In each of these cases, the Trustee brought suit in a State

Court to recover property of a bankrupt upon the ground of a fraudulent preference. The right of this Court to review the decision in those cases was questioned by the defendants for reason that the Trustee had not expressly declared that he was suing to recover the preference under the Bankruptcy Act and not under the State law. This Court in ruling that there was a presumption that he was proceeding under the National Bankruptcy Act ruled that there was a Federal question thereby presented and the denial of the asserted right was a denial of the right or title specially claimed under a law of the United States (p. 411).

This Court is without authority to review the decisions of the Supreme Court of Pennsylvania in this case, even though the suit is by a Trustee in bankruptcy since the asset herein sought is such that if recoverable at all, was recoverable under the general law of the State of Pennsylvania and not by virtue of a Federal Statute, and this Court has so ruled: McKENNA v. SIMPSON, 129 U. S. 506, 512; THOMPSON v. FAIRBANKS, 196 U. S. 516, 523; CRAMER v. WILSON, 195 U. S. 408, 416.

Statement of the Case.

The following additional statement of facts is deemed necessary to a consideration of the questions involved.

The Petitioner brought suit to recover a stock assessment upon 3,000 shares (par value $100 per share) of the common capital stock of the Louis J. Bergdoll Motor Company, a corporation organized under the laws of the State of Pennsylvania. This suit was brought on July 13th, 1921, eight years and three months after the adjudication in bankruptcy of the company (R. 56). The respondent and his nominees had signed an application for charter for the bankrupt company, which was granted on March 18th, 1912, and there was issued to him and his nominees certificates for 3,000 shares of the common capital stock of the company

(R. 3). In payment for this stock the respondent transferred the entire capital stock of the New Jersey corporation of the same name and with this transfer of stock there was transferred to the Pennsylvania Company (now bankrupt) all of the assets of the New Jersey corporation, subject, however, to all the liabilities of the latter company (R. 35 and 36). No other stock was issued. Prior to this transfer, the respondent had paid into the treasury of the New Jersey corporation considerably more than $300,000 in cash, for which he had received no stock in that company (R. 33).

On January 8th, 1913, the said 3,000 shares of stock of the Pennsylvania corporation were assigned by the respondent to others (R. 4) and on April 11th, 1913, the corporation was adjudicated a bankrupt and the estate was found to be insolvent (R. 129). The claims of creditors filed against the bankrupt estate greatly exceeded the assets of the bankrupt coming into the hands of the Trustee and it was at once apparent to all concerned that there would be a substantial deficit even though the estate should succeed in certain litigation and in defeating certain contested claims (R. 128). All of this litigation terminated favorably for the bankrupt estate.

The respondent was a substantial creditor of the bankrupt and filed a claim for $395,860, which claim was subsequently reduced to $310,000 (R. 81, 82 and 83). This claim was contested by the Trustee, petitioner, who set up by way of defense the subscription of the respondent to the stock of the bankrupt corporation and the Referee thereupon found that the stock of the bankrupt company subscribed for by the defendant became fully paid and disallowed the claim to the extent of $300,000 and allowed the claim for the balance of $10,000 (R. 93 and 94).

No assessment upon the stock of the bankrupt company was ever made prior to the insolvency, nor did the Trustee in bankruptcy take any steps to cause such assessment to

be made until he filed his Petition for Assessment on October 22nd, 1917 (R. 128). When the Trustee filed this Petition for Assessment, the respondent herein as one of the creditors of the estate, believing that the Referee's finding that the stock had been full paid had adjudicated the point, contested the advisability of the assessment proceedings. The Referee, however, found that an assessment was necessary and fixed the rate at 51.85 per cent of the par value. Then at the instance of the Trustee the Referee directed the respondent to pay to the Trustee the sum of $155,571.97, being 51.85 per cent of the par value of 3,000 shares of the capital stock, together with interest from April 1, 1912, the date the certificates were issued and then specified the total amount to be paid was $219,771.34 (R. 54).

The petitioner was thereby seeking in a summary proceeding to accomplish results which could only be secured in a plenary proceeding in a proper court, and an appeal was taken to the United States District Court and from thence to the United States Circuit Court of Appeals and before the last named tribunal the decree of the District Court was reversed insofar as it fixed the personal liability of this respondent and insofar as it fixed the amount of the assessment, but the decree was affirmed insofar as it adjudicated the necessity for the assessment on the stock of the bankrupt, the rate thereof and those who appeared *prima facie* subject to the assessment (R. 16, 17, 18 and 19).

A mandate was issued on the 27th of March, 1920 (R. 55) and the present suit was not entered until the 13th day of July, 1921. The respondent set up a number of defenses on the merits and also pleaded the Statute of Limitations of the State of Pennsylvania.

At the trial of the cause, a verdict was directed for the plaintiff, the trial Judge ruling that there was no question of fact to be submitted to the jury either as to the amount of the assessment or upon the other defenses set up by the respondent; that respondent was concluded by the assess-

ment proceedings in the United States Court, although he offered positive evidence that the stock was full paid and further that the matter was *res adjudicata* (R. 51). Subsequently, upon a motion for judgment *non obstante veredicto,* the Court of trial ruled that the claim was barred by the Statute of Limitations and entered judgment for the defendant (R. 121). Upon appeal, the Supreme Court of Pennsylvania sustained the decision on the ground that the State Statute of Limitations had barred the right of action, if any, and further holding that in view of their decision on this ground it was not necessary to consider the other points of defense to the claim.

ARGUMENT.

Summary.

The decision of the Supreme Court of Pennsylvania in this case does not involve any Federal question. No construction of the Bankruptcy Statute was called into question and no decision was made against any title, right, privilege or immunity claimed under the Constitution of the United States, or any Statute thereof. The point involved in the decision of the Supreme Court of Pennsylvania is stated in their Opinion filed (R. 129), as follows:

> "The sole question for our determination is whether the statute began to run at the time the motor company was adjudicated a bankrupt and the estate found to be insolvent, viz., April 11th, 1913, or whether it did not begin to run until the date of final judgment of the United States Circuit Court of Appeals of March 27th, 1920, sustaining the referee's order for assessment".

No contention was made by the petitioner that the Sta-

tute of Limitations of the State of Pennsylvania was not applicable but he did contend that the right of action did not accrue upon the stock subscription until the assessment was made. The Supreme Court of Pennsylvania held that the right of action accrued in this case at the time the corporation was adjudged a bankrupt on the grounds of insolvency and that no suit having been brought on the said claim within six years thereafter, the right of action was barred.

The time when the right of action accrued to the petitioner and the construction of the Statute of Limitations applicable to such claim were the only points involved in the decision of the Supreme Court of Pennsylvania, and on the authority of the decisions of the Supreme Court of the United States, we respectfully submit that no Federal question reviewable by this Court is presented.

The Power of this Court to Review Decisions of State Courts.

The United States Constitution, after defining the original jurisdiction of the Supreme Court, provides (Article III, Sec. 2, clause 2) that, "in all the other cases before mentioned (i. e., the cases to which the judicial power of the United States extends) the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make" and under this clause it has been held that Congress has power to provide for the review of the decisions of the State courts. See: COHENS v. VIRGINIA, 6 Wheat. 264, 416.

By Section 237 of the Judicial Code (5 Fed. Stat. Ann. 2nd Ed., 723), it is provided as follows:

> "It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought

up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the validity of a statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority."

To warrant the exercise by the United States Supreme Court of jurisdiction to review a decision of a State Court, the decision must fall within one of these three categories:

MILL v. BROWN, 16 Pet. 525, 527;
SEVIER v. HASKELL, 14 Wall. 12, 14;
HOME INS. CO. v. AUGUSTA, 93 U. S. 116, 121.

Limitation of the Power to Review Decisions of State Courts.

This Court does not possess the jurisdiction of a general reviewing court of error, but is limited to a consideration of the specific instances of denials of federal rights.

WATERS-PIERCE OIL CO v. TEXAS, 212 U. S. 86, 97.

It is only where the existence or validity of an authority exercised under the law of the United States is denied and the denial forms the subject of direct inquiry, that the validity of such authority is drawn into question. U. S. v. LYNCH, 137 U. S. 280, 286, 287.

No Federal Question Involved in Decision of the Supreme Court of Pennsylvania in this Case.

In this proceeding, in the State court no decision was made against the validity of any Statute of or authority exercised under the United States, or against any title, right, privilege or immunity claimed under the Constitution of the United States, or any Statute thereof. This Court has ruled that it has no jurisdiction to review the judgment of the Supreme Court of the State in such a case as the one at bar: McKENNA v. SIMPSON, 129 U. S. 506, 512.

A Federal Question is Not Presented Merely Because Petitioner is a Trustee in Bankruptcy.

Nor does the Supreme Court of the United States have any jurisdiction to review the decision of a State Court merely because the suit was brought by a Trustee or Assignee in bankruptcy to recover property alleged to belong to the bankrupt estate. Thus in the case of McKENNA v. SIMPSON, supra, it was held that where the assignee in bankruptcy resorted to the State Court to set aside certain conveyances made by the bankrupt alleged to have been made to defraud his creditors and no question was there raised as to the assignee's power under the Act of Congress, or the rights vested in him as assignee, the judgment of the Court sustaining the validity of the conveyance and denying a right of recovery, presented no Federal question so as to give the United States Supreme Court jurisdiction to review the decision of the State court.

In THOMPSON v. FAIRBANKS, 196 U. S. 516, it was held that in an action brought by a Trustee in bankruptcy

in a State court to recover from the bankrupt's mortgagee the proceeds of a sale of mortgaged property, that whether and to what extent a chattel mortgage covering after acquired property is valid is a local question on which the decisions of the State courts will be followed by the Federal Supreme Court in determining whether the taking possession of the mortgaged chattels after condition broken amounted to a preference voidable by mortgagor's trustee in bankruptcy; that the decision of a State court as to whether a conveyance by a bankrupt was made with intent to defraud his creditors does not present a Federal question which can be considered by the Federal Supreme Court on writ of error to a State court.

Action is on the Contract, Not on the Assessment Proceedings.

Petitioner, in his brief, takes the position that his suit was based upon the assessment proceedings and not upon the contract of subscription, express or implied, that the respondent would pay into the treasury of the corporation the value of his stock. We contend that his position is erroneous and that the right to recover the unpaid balance upon a stock subscription is contractual in its nature and is based upon the law of contracts of the domicile of the corporation; which, in the instant case is the State of Pennsylvania where the suit was brought and the parties reside. This principle is stated in 14 Corpus Juris, Sec. 799, p. 535, as follows:

> "Subscriptions to the stock of a corporation are construed and the rights and liabilities of the parties determined according to the law of the domicile of the corporation, it being a reasonable implication that the parties intended to be governed by that law".
> Citing, *inter alia*:

NASHUA SAVINGS BANK v. ANGLO AMERICAN CO., 189 U. S. 221, 230;
PITTSBURGH FIRST NATIONAL BANK v. DARLINGTON, 25 Pa. Super. 438, 440;

to the same effect see:

BALL v. ANDERSON, 196 Pa. 86, 88;
COMMERCIAL NATIONAL BANK v. KIRK, 222 Pa. 567, 570.

The Proceeding to Assess Was an Administrative Order and Not a Judgment.

The proceeding to assess the stock was purely an administrative order and was not a judgment against any of the stockholders in their individual capacity. This point has been decided by the Circuit Court of Appeals in the case of BERGDOLL v. HARRIGAN, 263 Fed. 279, 281.

This Court has also passed upon the point in the case of GREAT WESTERN TELEGRAPH COMPANY v. PURDY, 162 U. S. 329, 336, 337, where the Court said, referring to an order for assessment on the stock of the corporation:

> "The order of that court was in effect, as it was in terms, simply a 'call or assessment' upon all stockholders who had not paid for their shares in full. It was such as the directors might have made before the appointment of a receiver; and in making it the court, having by that appointment assumed the charge of the assets and affairs of the corporation, took the place and exercised the office of the directors. Scoville v. Thayer, 105 U. S. 143, 155; Hawkins v. Glenn, 131 U. S. 319, 329; Lamb v. Lamb, 6 Bissell, 420, 424; Glenn v. Saxton, 68 California, 353; Great Western Tel. Co. v. Gray, 122 Illinois, 630, 636, 640; Great Western Tel. Co. v. Lowenthal, 154 Illinois, 261.

The order of assessment, whether made by the directors as provided in the contract of subscription, or by the court as the successor in this respect of the directors, was doubtless, unless directly attacked and set aside by appropriate judicial proceedings, conclusive evidence of the necessity for making such an assessment, and to that extent bound every stockholder, without personal notice to him. Hawkins v. Glenn, 131 U. S. 319; Glenn v. Liggett, 135 U. S. 533; Glenn v. Marbury, 145 U. S. 499.

"But the order was not, and did not purport to be, a judgment against any one. It did not undertake to determine the question whether any particular stockholder was or was not liable in any amount. It did not merge the cause of action of the company against any stockholder on his contract of subscription, nor deprive him of the right, when sued for an assessment, to rely on any defence which he might have to an action upon that contract.

"In this action, therefore, brought by the receiver, in the name of the company, as authorized by the order of assessment, to recover the sum supposed to be due from the defendant, he had the right to plead a release, or payment, or the statute of limitations, or any other defence, going to show that he was not liable upon his contract of subscription."

The Pennsylvania Courts were not obliged to consider the assessment proceedings in the United States Courts other than the equivalent of a call or assessment. GREAT WESTERN TELEGRAPH COMPANY v. PURDY, supra.

"The whole effect of the order of assessment being to fix the amount which any stockholder liable under his contract of subscription should pay, and to authorize the receiver to bring suits against stockholders for the same, but not to determine whether the present

defendant, or any other particular stockholder was liable for anything, the Iowa court, by sustaining the defence of the statute of limitations, did not deny to the judicial proceeding of Illinois the full faith and credit to which it was entitled."

Assessment Proceedings Were Unnecessary.

Under the law of the State of Pennsylvania the assessment proceedings were not necessary prior to the institution of suit where, as in this case, the whole amount was needed to pay the claims of creditors. The whole assessment, if any, was due and was needed in this case in order to meet the claims of creditors and this was apparent immediately following the adjudication in bankruptcy. The Supreme Court of Pennsylvania in its Opinion (R. 128) states:

> "After the assets of the company were converted into cash and distributed among creditors, there remained a deficit of approximately $184,000. This situation made it apparent to all interested not only that the company was insolvent, but that there existed a large shortage for which the stockholders would be liable to the extent of the unpaid balance due on the stock held by them respectively".

It has always been held under such circumstances that no necessity for a call or assessment exists, nor is it necessary to take proceedings to fix the rate of the assessment when the full amount is needed.

In the case of CITIZENS AND MINERS SAVINGS BANK v. GILLESPIE, 115 Pa. 564, 572, in which a similar situation was present, to wit, a suit by the assignee for the benefit of creditors to recover the entire balance due on a subscription to the capital stock of an insolvent corporation, and the same objection was taken, to wit, that no assessment had been made, it was held (p. 572):

"There being no assessment in evidence, the learned Judge left it to the jury to find whether the whole of the unpaid subscription was required to pay the debts of the company. We see no error in this. If all the unpaid subscriptions were required to pay the creditors, no assessment was necessary under the authority of Yeager vs. Scranton Trust Co., 14 W. N. C. 296."

This principle of Pennsylvania law was recognized in the case of POTTS v. WALLACE, 146 U. S. 689, 701.

Not only is this the law of Pennsylvania but it is the law of other states. In WALSH, TRUSTEE, etc. v. SHANKLIN, 125 Kentucky, 715, 722, the Court holds that an assessment by the Court or the directors of a corporation is not necessary to enable a trustee in bankruptcy to maintain an action against the stockholders for unpaid subscriptions where the total amount due and payable from all stockholders is not more than sufficient to pay the debts of the corporation. To the same effect is the case of EDWARDS, TRUSTEE v. SCHILLINGER, 245 Ill. 231, 244.

The foregoing cases apply with full force under the facts of the instant cases. From the day when the Bergdoll Motor Company was declared insolvent until the present, the alleged unpaid stock subscription of Louis J. Bergdoll, if owing, was required to meet the debts of the company, for even with it added the assets would be insufficient to meet the liabilities. The trustee in bankruptcy could have brought suit against Bergdoll immediately after the adjudication without an order of assessment from the Court. The proceedings in the United States Court were totally unnecessary as a preliminary to the fixing of the liability of the respondent. They did not, as a matter of fact, either add to or subtract from his liability, and it was not necessary that any such proceedings should have been taken.

The Claim Was Barred by the Pennsylvania Statute of Limitations.

The assessment proceeding, therefore, was merely the equivalent of a call, not essential prior to the institution of suit in the present case and the right of action, if any, to recover the unpaid balance upon the stock subscription was based upon the law of contracts of the State of Pennsylvania and subject to its statute of limitations.

The statute of limitations of the State of Pennsylvania, to wit, the Act of March 27, 1713, Section 11, Smith's Laws 76, provides that:

> "All actions of trespass quare clausum fregit, all actions of detinue, trover and replevin, for taking away goods and cattle, all actions upon account and upon the case (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants), all actions of debt grounded upon any lending, or contract without specialty, all actions of debt, for arrearages of rent, except the proprietaries' quit-rents, and all actions of trespass, of assault, menace, battery, wounding and imprisonment, or any of them, which shall be sued or brought at any time after the five and twentieth day of April, which shall be in the year of our Lord one thousand seven hundred and thirteen, shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case, other than for slander, and the said actions for account, and the said actions for trespass, debt, detinue and replevin, for goods or cattle, and the said actions of trespass quare clausum fregit within three years after the said five and twentieth day of April next, or within six years next after the cause of such actions or suit, and not after."

Reducing the above citation to the part thereof particularly applicable to this case:

> "* * * all actions of debt founded upon any lending or contracting without specialty * * * shall be commenced and sued within the time and limitation hereinafter expressed and not after, that is to say * * * debt * * * within six years next after the cause of such action or suit and not after * * *."

This statute was applicable to the case at bar. In the case of SCUDDER v. UNION NATIONAL BANK, 91 U. S. 406, 412, Mr. Justice Hunt lays down the following principles:

> "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of the performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought."

In the case of GREAT WESTERN TELEGRAPH COMPANY v. PURDY, supra, this principle is further stated (339):

> "The limitation of actions is governed by the lex fori, and is controlled by the legislation of the State in which the action is brought, as construed by the highest court of that State, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions. McElmoyle v. Cohen, 13 Pet. 312; Bauserman v. Blunt, 147 U. S. 647; Metcalf v. Water-

town, 153 U. S. 671; Balkam v. Woodstock Iron Co., 154 U. S. 177."

In the case of TIOGA RAILROAD COMPANY v. BLOSSBURG & C. R. CO., 87 U. S. 137, where construction placed upon the State Statute by the State courts was followed by the United States Supreme Court, Mr. Justice Bradley said (p. 143):

> "The decisions upon construction of the statute are binding upon us whatever we may think of their soundness on general principles."

The Determination of the Time When the Action Accrued Was a Question of Local Law.

The Supreme Court of Pennsylvania in this case ruled, as it was its province to do, that the accrual of the right of action was a point for its determination and that the right of action accrued at the time the corporation was adjudged a bankrupt on the ground of insolvency. It has been uniformly held, under the law of the State of Pennsylvania, that at insolvency the right of action accrues to the creditors,—in this instance to the trustee in bankruptcy—to recover from stockholders any unpaid balance due upon stock subscriptions. The Pennsylvania cases clearly established the rule and the following are cited as leading cases upon the subject:

SWEARINGEN v. DAIRY COMPANY, 198 Pa. 68 (1901) 73;
NEWTON'S ESTATE, 46 Pa. Super. 40, 44;
HARRIGAN v. BERGDOLL, 281 Pa. 186, 189.

In the case of Swearingen v. Dairy Company, supra, the creditors of the Dairy Company brought a bill in equity against a corporation and its stockholders to enforce the payment of an alleged balance due on stock subscriptions. The Dairy Company was organized in 1889 and about July

1st, of that year, certain stock upon which had been paid 75% in cash was issued as full paid and came into the hands of the appellant. On January 5th, 1891, the company became insolvent and made an assignment for the benefit of its creditors. The present bill was filed June 30th, 1899, to collect the 25% unpaid subscriptions. The Court below entered a decree requiring payment to the receiver. Upon an appeal, the Supreme Court, before Mr. Justice Mitchell, held (p. 73):

> "When does the right of action by the creditors for unpaid subscriptions accrue? Such subscriptions are a fund in the hands of the stockholders charged with a trust for the payment of the corporate debts. This trust does not depend on any statute but is deduced on general principles of equity from the premise that the capital is publicly pledged to those who deal with the corporation for their security; Lane's App., supra. So long as the corporation is solvent, the whole subscription is due in accordance with its terms and is payable when and as called for by the corporation. But when the corporation becomes insolvent, the contract between it and the subscriber is terminated and his debt to it then is only for such part of his subscription as is required to pay the corporate debts. It is a debt not to it in its own right but in the right of its creditors. But it would seem that the status of the stockholder as holder of a fund liable at least contingently to the creditors, must be fixed at the time and by the fact of the ascertainment of insolvency. It is the general rule that insolvency fixes the relative rights of all the parties concerned. From that moment the unpaid subscriptions become part of the assets for payment of the creditors. * * * The right of action of the plaintiff, whatever it was, accrued upon the fact of insolvency of the dairy company shown by the assignment for the benefit of creditors, and the Statute of

> Limitations began to run from that date. The bill therefore, was too late."

This Court has uniformly ruled that the determination of the accrual of an action is a question of local law and is to be decided by the State court where the suit is brought. Thus in the case of GREAT WESTERN TELEGRAPH CO. v. PURDY, supra, it is stated (339):

> "The question at what time the cause of action accrued in this case, within the meaning of the statute of limitations of Iowa, was not a Federal question, but a local question, upon which the judgment of the highest court of the State cannot be reviewed by this Court."

This Court Distinguishes Between the Review of Decisions of Commercial Law in Cases Coming up From the State Courts and Those Coming up From the United States Courts.

The petitioner places great reliance upon the case of Scovill, etc. v. Thayer, 105 U. S. 143. In that case an assessment order was essential because the total liability of the stockholders on unpaid subscriptions exceeded the amount required to pay the creditors in full. This also was a case brought in the United States Courts and came up from the Circuit Court of Appeals. Petitioner cites a number of cases in his brief holding that the United States Courts are not bound by the decisions of the State Courts respecting questions of general commercial law. He fails to differentiate, however, between those cases when instituted in the United States Courts and cases such as the instant one where the decision of the Supreme Court of the State is to be reviewed by this Court on writ of certiorari. The distinction is clearly pointed out in the case of GREAT WESTERN TELEGRAPH CO. v. PURDY, supra, where this Court has stated (338):

"In many jurisdictions, the cause of action, within the meaning of a statute of limitations, would be held to have accrued at the time of the order for an assessment, and not before. It has been so held by the Supreme Court of the State of Illinois, where this company was incorporated and the order of assessment made, as well *as by this Court in cases coming up from Circuit Courts of the United States and unaffected by decisions of the highest court of the State in which those courts were held.* Great Western Tel. Co. v. Gray; Hawkins v. Glenn; Glenn v. Liggett; and Glenn v. Marbury, above cited.

"But the Supreme Court of Iowa in the present case held that, as it rested with the directors of the corporation to make that order, the delay in making it could not suspend the operation of the statute of limitations; and that the case was within the rule, established by a series of decisions of that court, that when a plaintiff could at any time, by making a demand, or giving a notice, acquire a right to recover against the defendant, the statute of limitations began to run when he might have done so. Great Western Tel. Co. v. Purdy, 83 Iowa 430, 433, and cases cited.

"The limitation of actions is governed by the lex fori, and is controlled by the legislation of the State in which the action is brought, as construed, by the highest court of that State, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions. McElmoyle v. Cohen, 13 Pet. 312; Bauserman v. Blunt, 147 U. S. 647; Metcalf v. Watertown, 153 U. S. 671; Balkam v. Woodstock Iron Co., 154 U. S. 177."

We respectfully submit, therefore, that in this case the Supreme Court of the State of Pennsylvania, in an appeal coming up from the State court, had a right to determine

the time when the right of action accrued upon a stock subscription of the corporation domiciled in the State of Pennsylvania, where the contract was entered into, and where the parties to the suit resided and there being no Federal question involved, *its* interpretation of the common law, according to its understanding, is not subject to review. PENNSYLVANIA RAILROAD COMPANY v. HUGHES, 191 U. S. 477, 486.

The Decision of the Court Below is Tenable on Other Grounds.

The Record in this case shows that the judgment of the Court below could stand upon other grounds, free from objection so far as Federal rights are concerned and under the rulings of this Court, no Federal question, therefore, is presented. WATERS PIERCE OIL COMPANY v. TEXAS, 212 U. S. 86, 106.

The action of the Court of trial in refusing to consider the defenses presented by the respondent was argued in the Supreme Court of Pennsylvania but was not passed upon by that tribunal, the Court saying (R. 128):

> "Several defenses were advanced at the trial, the only one, however, requiring consideration here is one raising the applicability of the Statute of Limitations."

There Was no Basis for the Verdict.

Among the defenses raised at the trial, the question of the actual value of the assets turned over to the corporation in payment of the stock was certainly a question for the jury to decide, particularly in view of the fact that no evidence was offered by the Petitioner as to the value thereof other than the Record of the assessment proceeding. The Respondent offered in evidence positive testimony showing that the amount paid for the stock was considerably in excess of $300,000, but the Court refused to submit the point

to the jury for decision and directed a verdict for the plaintiff (R. 51). The verdict therefore entered had no other basis for its amount other than the arbitrary amount set forth in the petition for an assessment and allowed by the Referee in the administrative order. This was error on the part of the trial Court. GREAT WESTERN TELEGRAPH COMPANY v. PURDY, supra (336).

The Suit Was Res Adjudicata.

The suit for the unpaid balance due upon the stock so far as this respondent was concerned was then *res adjudicata.* The record in this case shows that on March 10th, 1914, Louis J. Bergdoll (now known as Louis J. Bergson), respondent, filed with Richard H. Hunter, Esq., the referee before whom the cause was then pending his proof of claim against the bankrupt estate for $395,860 for moneys advanced from April 2nd, 1911, to the Louis J. Bergdoll Motor Company of New Jersey (R. 81 et seq.). The claim was objected to by the Trustee, petitioner herein, and the claim was reduced by the respondent to $310,000. After taking of testimony and hearing argument of counsel, the referee, on January 7th, 1915, filed his opinion and order (R. 83 et seq.) wherein he concludes as follows (R. 93):

> "On May 31, 1912, the assets and liabilities of the New Jersey Corporation were transferred to the Pennsylvania Company then newly organized. Among the liabilities transferred was the Louis J. Bergdoll loan account of $10,000. The amount paid to the New Jersey Company on account of capital stock was stated at $300,000. For the property thus transferred the Pennsylvania Company issued 3000 shares of full paid, non-assessable stock of the par value of $100; Louis J. Bergdoll receiving 2998 shares, Frank J. Fanning and E. Lawrence Webster one share each."

And finally concluding (R. 93-94) as follows:

"The Referee finds that the sum of $300,000 was contributed by Louis J. Bergdoll to the capital stock of the New Jersey Company, and that the stock of the Pennsylvania Company, which took over its assets and liabilities thereby became full paid.

"The Referee disallows the claim of Louis J. Bergdoll against the bankrupt for the sum of $300,000.

"The Referee allows the claim of Louis J. Bergdoll as a creditor of the bankrupt in the sum of $10,000."

From an examination of the opinion of Referee Hunter, it will be found that all of the questions of fact involved in the present controversy were presented in the proceedings had before him and were material and necessary and actually and directly in issue in the determination of the controversy then before the Referee in said proceedings and were there judicially passed upon and determined.

We respectfully submit, therefore, that the Supreme Court of Pennsylvania could have ruled that the contention respecting the right of the petitioner to recover upon a stock subscription should have been decided in favor of the respondent on the ground that the point was already adjudicated.

The Petitioner is Estopped to Deny that the Stock Was Full paid as to the Respondent.

Further, the petitioner having taken this position in the proceeding before the Referee he could not, under the law of the State of Pennsylvania, change his position to suit the occasion and maintain that the stock of the Pennsylvania Company was not paid for by the cancellation of the capital stock liability against the New Jersey corporation, which liability was assumed by the Pennsylvania corporation, when he had been successful in the previous case on that contention. (16 Cyc. 799):

"A claim made or position taken in a former action or judicial proceeding will estop the party to make an inconsistent claim or to take a conflicting position in a subsequent action or judicial proceeding to the prejudice of the adverse party, where the parties are the same and the same questions are involved. Thus a party who has successfully interposed a defense or objection in one action or proceeding cannot shift his ground and take a position in another action or proceeding which is so inconsistent with his former defense or objection as necessarily to disprove its truth".

See also McQUEEN'S APPEAL, 104 Pa. 595, 601, 602:

"It is settled that, 'A man who obtains or defeats a judgment by pleading or representing an act in one respect, will be precluded from giving it a different and inconsistent character in a subsequent suit upon the same subject.' "

To the same effect will be found:

ARONSON v. CLEVELAND, &c. R. R. CO., 70 Pa. 68, 69;
CAMPBELL v. STEPHENS, 66 Pa. 314, 318;
MOSER v. R. R., 233 Pa. 259, 270.

CONCLUSION.

Under all the circumstances, it is respectfully submitted that the decision of the Supreme Court of the State of Pennsylvania in this case on the question of the Statute of Limitations and the accrual of the action in this case is final.

Respectfully submitted,

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